(16,708.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 188.

THE SECURITY TRUST COMPANY, AS ASSIGNEE OF THE D. D. MERRILL COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK H. DODD, BLEECKER VAN WAGENNEN, AND EDWARD H. DODD, COPARTNERS AS DODD, MEAD & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1898.

1 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company, Plaintiff in Error, vs. FRANK H. DODD, BLEECKER VAN WAGENNEN, and EDWARD H. DODD, Copartners as Dodd, Mead and Company, Defendants in Error.	No. 916. In Error to the Circuit Court of the United States for the District of Minnesota.

The United States circuit court of appeals for the eighth circuit, sitting in the city of St. Paul, Minnesota, on the eleventh day of October, 1897, hereby certifies that from the record on file in said court in case No. 916, entitled Security Trust Company, as assignee of the D. D. Merrill Company, plaintiff in error, against Frank H. Dodd, Bleecker Van Waggenen and Edward H. Dodd, copartners under the firm name of Dodd, Mead and Company, defendants in error; which said cause is now pending and undetermined in said court of appeals on a writ of error duly issued to the circuit court of the United States for the district of Minnesota, the following facts appear, to wit:

That a suit was brought by The Security Trust Company, the above-named plaintiff in error, against Frank H. Dodd, Bleecker Van Waggenen, and Robert H. Dodd, the above-named defendants in error, in the district court for the second judicial district of the State of Minnesota, to recover the value of certain personal property, consisting of sixty thousand stereotyped and electrotyped plates for making and printing books, alleged to be of the value of ten thousand dollars, upon the ground that the defendants had unlawfully converted said personal property to their own use; which said suit was duly removed from said State court to the circuit court of the United States for the district of Minnesota and was there tried; that upon the trial of said cause the facts on which the plaintiff's right to recover depended were as follows, to wit:

2 That on and prior to the 23rd day of September, 1893, the D. D. Merrill Company was a corporation duly organized and existing under the laws of the State of Minnesota and carrying on a mercantile business at the city of St. Paul, in said State, and that on and prior to said last-mentioned day the said D. D. Merrill Company on account of misfortunes in business had become and was insolvent and was unable to pay its debts in the usual course of business, and thereupon, on said 23rd day of September, 1893, the said D. D. Merrill Company, under and pursuant to the provisions of chapter 148 of the Laws of 1881 of the State of Minnesota and the several acts amendatory thereof, duly made and executed and delivered to The Security Trust Company, the plaintiff in error herein, a certain deed of assignment hereinafter described; which said assignment was on said day filed in the office of the clerk of the district

court of the State of Minnesota in and for the county of Ramsey, in said State; that the said Security Trust Company duly accepted the trust imposed upon it by virtue of said deed of assignment, and thereupon duly qualified as such assignee and entered upon the discharge of its duties as such, and thereupon took possession of such part of the property of said insolvent corporation as was to be found in the State of Minnesota, and afterwards sold and disposed of the same for the benefit of the creditors of said insolvent corporation; that the defendants in error above named had full knowledge of the execution and filing of such assignment prior to the 8th day of March, 1894.

That on the 23rd day of September, 1893, the said D. D. Merrill Company was justly and truly indebted to the defendants above named, to wit, Frank H. Dodd, Bleecker Van Waggenen, and Edward H. Dodd, in the sum of one thousand two hundred and forty-nine dollars and ninety-eight cents, said indebtedness consisting of a demand for goods, wares, and merchandise theretofore sold and delivered by said defendants to said D. D. Merrill Company.

That on the 12th day of August, 1893, the said D. D. Merrill Company was justly indebted to Alfred Mudge and Sons, a copartnership residing and doing business in the city of Boston, in the State of Massachusetts, in the sum of one hundred and
3 twenty-six dollars and eighty cents; which said indebtedness was thereafter, on or about March 1, 1894, duly assigned and transferred to the above-named defendants in error, making the total indebtedness of the said D. D. Merrill Company to the defendants in error amount to the sum of one thousand three hundred and seventy-six dollars and seventy-eight cents on or about said first day of March, 1894.

That at all times and dates hereinbefore mentioned the above-named defendants in error, to wit, Frank H. Dodd, Bleecker Van Waggenen, and Robert H. Dodd, were merchants, doing business at the city of New York, in the State of New York, under the firm name of Dodd, Mead and Company; that said Bleecker Van Waggenen was at all times heretofore mentioned and still is a citizen of the State of New Jersey, and that Frank H. and Robert H. Dodd were at all said times citizens of the State of New York, and that all the persons composing the aforesaid firm of Alfred Mudge and Sons were at all the times heretofore mentioned and still are citizens of the State of Massachusetts.

That on and prior to the 23rd day of September, 1893, the said D. D. Merrill Company was the owner of the personal property heretofore mentioned, consisting of stereotyped and electrotyped plates for making and printing books, and the same was then and thereafter continued to be in the custody and possession of the above-mentioned firm, Alfred Mudge and Sons, at the city of Boston, in the State of Massachusetts, until the same was attached and taken into the possession of the sheriff of the county of Suffolk, in said State of Massachusetts, as hereinafter stated, and that the plaintiff in error herein, The Security Trust Company, never ac-

quired the actual custody or possession of said property or any part thereof.

That the firm of Alfred Mudge and Sons, prior to the 8th day of March, 1894, were informed that the said D. D. Merrill Company had made an assignment for the benefit of its creditors under the laws of the State of Minnesota, and that on or about the 25th day of September, 1893, a notice was personally delivered to said firm of
Alfred Mudge and Sons, at their place of business, in said
4 city of Boston, by one George E. Merrill, to the effect that
he, Merrill, took possession of the property aforesaid for and in behalf of the Security Trust Company, as assignee of the D. D. Merrill Company.

That on the 8th day of March, 1894, the defendants in error above named, to wit, Frank H. Dodd, Bleecker Van Waggenen, and Robert H. Dodd, commenced an action against said D. D. Merrill Company in the superior court for the county of Suffolk, in the Commonwealth of Massachusetts, upon the indebtedness of said D. D. Merrill Company heretofore described, and on said 8th day of March, 1894, caused a writ of attachment in the usual form to be duly issued out of said court in said suit, directed to the sheriff of said county of Suffolk, in the Commonwealth of Massachusetts, directing and commanding that officer to attach such of the personal property of the said D. D. Merrill Company, the defendant therein, as should be found within his said county, or so much thereof as should be sufficient to satisfy the demand of the plaintiffs in said action, together with their costs and expenses, and to safely keep the same until the final determination of said action; that under and in pursuance of said writ of attachment the said sheriff did, on said March 8, 1894, duly attach and take into his possession as the property of said D. D. Merrill Company the personal property hereinbefore described, then in possession of Alfred Mudge and Sons; that the summons in said action was duly served by publication in the manner prescribed by the statutes of the State of Massachusetts, and there was no personal service thereof upon the said D. D. Merrill Company, but the plaintiff in error herein, The Security Trust Company, was informed of the bringing and pendency of said suit by attachment and of the seizure of the property above mentioned prior to the entry of a judgment in said action.

That on the 6th day of August, 1894, a judgment was duly rendered in the suit last above mentioned in favor of the defendants in error herein against said D. D. Merrill Company for the sum of one thousand four hundred and sixty-two dollars and thirty-eight cents damages and forty-seven dollars and forty-one cents costs; and thereupon, on said last mentioned date, an execution in due form was issued out of said court upon said judgment, directed
to the sheriff of Suffolk county, in the Commonwealth
5 of Massachusetts, commanding and directing that officer to
satisfy the judgment out of the personal property of the said D. D. Merrill Company so, as aforesaid, held by him under said writ of attachment, and to return said execution to said court with a report

of his proceedings thereunder, in the manner provided by law; and that in obedience to said execution the said sheriff did thereupon levy said execution upon the personal property hereinbefore described, and duly advertised said property for sale under the provisions of the laws of the State of Massachusetts, at a time and place duly specified in said notice; that on the 27th day of September, 1894, said property was duly offered for sale at public auction, at the city of Boston, in the State of Massachusetts, and the same was thereupon sold, pursuant to the directions contained in the aforesaid execution, by the sheriff of Suffolk county, in the Commonwealth of Massachusetts, to the defendants in error herein, who were the execution creditors, for the sum of one thousand dollars, and said execution was thereafter duly returned satisfied by said sheriff to the extent of nine hundred and fifty-nine dollars.

That the deed of assignment executed by the D. D. Merrill Company to the plaintiff in error herein, The Security Trust Company, was in the following form, to wit:

"This indenture, made this 23rd day of September, A. D. 1893, between D. D. Merrill Company a corporation, party of the first part, and the Security Trust Company, a corporation created and existing under the laws of the State of Minnesota, and having its principal place of business in the county of Ramsey and State of Minnesota, party of the second part.

"Whereas, said party of the first part is justly indebted to divers and sundry persons in considerable sums of money, and by reason of losses and misfortunes has become, and now is solvent, and is desirous of making a fair and equitable distribution of its property and effects among its creditors, according to law and the statutes in such cases made and provided.

"Now therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises and the sum of one
6 dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged hath granted, bargained, sold, conveyed, transferred, set over and assigned, and by these presents does grant, bargain, sell, convey, transfer, set over, assign and deliver unto the said Security Trust Company, party of the second part its successors and assigns, all the lands, tenements, hereditaments, appurtenances, goods, chattels, choses in action, claims, demands, property and effects belonging to the party of the first part, wherever the same may be situated, and of whatever name or nature, except such property as is exempt from attachment or sale on execution.

"To have and to hold the same, and every part and parcel thereof with the appurtenances, unto the said party of the second part, its successors and assigns.

"In trust nevertheless, that the said Security Trust Company shall forthwith take possession of the said premises, property and effects hereby assigned, and shall sell and dispose of the same with all reasonable diligence and convert the same into money, and also collect all such debts and demands hereby assigned, as may be col-

lectible and with and out of the proceeds of such sales and collection shall

"First. Pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, including the reasonable and lawful compensation of the party of the second part for its services in executing the said trust;

"Second. Pay and discharge in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter one hundred and forty-eight of the General Laws of the State of Minnesota, for the Year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their
7 respective amounts, according to law and the statute in such cases made and provided, and if after the payment of all the costs, charges and expenses attending the execution of said trust and the payment and discharge in full of all the said debts of the said party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then,

"Third. Repay such surplus to the party of the first part its successors and assigns.

"And for the more effectual execution of the trust hereby created, the party of the first part does hereby make, constitute, and appoint the party of the second part its true and lawful attorney irrevocable, with full power and authority to do and perform all acts, deeds, matters and things which may be necessary to the full execution of said trust, and for the purpose of said trust to ask, demand, recover and receive of and from all and every person or persons, all the property, debts and demands belonging to the party of the first part, and to give acquittances for the same, and to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all deeds and instruments of conveyance necessary and proper for the better execution of said trust.

"In testimony whereof the said insolvent
[CORPORATE SEAL.] has caused these presents to be signed by its president and secretary and its corporate seal to be hereunto affixed this 23rd day of September, A. D. 1893.

"D. D. MERRILL COMPANY,
"By D. D. MERRILL, *President*,
"By LEAVITT K. MERRILL, *Secretary*."

That said deed of assignment was further duly acknowledged in the mode prescribed by the laws of the State of Minnesota under and by virtue of which it purported to have been executed.

And the said United States circuit court of appeals further certifies that to the end that it may properly decide the questions

arising in said cause and presented by the record and assignment of errors herein said court desires the instruction of the Supreme Court upon the following questions and propositions of law arising upon said record, to wit:

8 First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder vest said assignee with the title to the personal property aforesaid then located in the State of Massachusetts and in the custody and possession of said Alfred Mudge and Sons.

Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge and Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim.

In witness whereof the undersigned judges, holding the said United States circuit court of appeals for the eighth circuit, have hereunto set their hands this eleventh day of October, A. D. 1897, at St. Paul, Minnesota, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

WALTER H. SANBORN,
Circuit Judge.
AMOS M. THAYER,
Circuit Judge.

9 United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of the Security Trust Company, as assignee of the D. D. Merrill Company, plaintiff in error, *vs.* Frank H. Dodd, Bleecker Van Waggenen, and Edward H. Dodd, copartners as Dodd, Mead and Company, No. 916, May term, 1897, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals for the eighth circuit, at the city of St. Paul, Minnesota, this eleventh day of October, A. D. 1897.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] U. S. circuit court of appeals, eighth circuit, May term, 1897. No. 916. The Security Trust Company, assignee, etc., pl'ff in error, *vs.* Frank H. Dodd *et al.* Certificate of questions to Supreme Court of the United States. Filed Oct. 11, 1897. John D. Jordan, clerk.

Endorsed on cover: Case No. 16,708. U. S. C. C. of appeals, 8th circuit. Term No., 188. The Security Trust Company, as assignee of the D. D. Merrill Company, plaintiff in error, *vs.* Frank H. Dodd, Bleecker Van Wagennen, & Edward H. Dodd, copartners as Dodd, Mead & Company. (Certificate.) Filed October 25th, 1897.

No. 495.

Motion to advance.

Filed May 6, 1898.

MAY 6 18
JAMES H. McKENN

In The Supreme Court of the United States

OCTOBER TERM, 1897.

No. 495.

THE SECURITY TRUST COMPANY, as assignee of D. D. Merrill Company, insolvent,

Plaintiff in Error,

vs.

FRANK H. DODD et al., copartners as Dodd, Mead & Co.,

Defendants in Error.

Propositions of law certified by the United States circuit court of appeals for Eighth Circuit for instruction for its proper decision.

MOTION TO ADVANCE.

In The Supreme Court of the United States

OCTOBER TERM, 1897.

No. 495.

THE SECURITY TRUST COMPANY, as assignee of D. D. Merrill Company, insolvent,

Plaintiff in Error,

vs.

FRANK H. DODD et al., copartners as Dodd, Mead & Co.,

Defendants in Error.

Propositions of law certified by the United States circuit court of appeals for Eighth Circuit for instruction for its proper decision.

MOTION TO ADVANCE.

To the Honorable, the Supreme Court of the United States:

In 1893 the D. D. Merrill Company, a corporation, citizen of Minnesota, having its principal place of business in Minnesota, made an assignment pursuant to the provisions of the statutes of Minnesota, chapter 148, Laws 1881, as amended, (see General Statutes 1894, Sec. 4240-54), to the plaintiff in error, also a citizen and resident of Minnesota, to pay and discharge in the order and precedence provided by law, all the debts and liabili-

ties of the assignor to all its creditors who should file releases of their debts and claims against the assignor according to said chapter 148, Laws of 1881, and the laws amendatory and supplementary thereof. At the date of this assignment certain property of the insolvent debtor was situated in the state of Massachusetts, and subsequent to the assignment the defendants in error, citizens and residents of New York and New Jersey, commenced an action against the insolvent corporation in a state court of Massachusetts upon certain bills of exchange and promissory notes which it was obligated to pay, and in such suit the personal property above mentioned was seized on attachment, and thereafter, on September 27, 1894, sold under execution on the judgment entered in that action, and at such sale purchased by the defendants in error. In October, 1894, the plaintiff in error commenced this suit in a state court of Minnesota to recover ten thousand dollars ($10,000), the value of the property so seized and sold as damages for the conversion thereof, and the defendants in error removed the suit into the United States circuit court for the District of Minnesota. The trial court gave judgment for the defendants in error. The case was taken by a writ of error to the United States circuit court of appeals for the Eighth circuit, and that court certified to this court two questions of law, concerning which it desires the istruction of this court. The questions in substance are:

Did the assignment, *ipso facto*, operate to vest in the plaintiff in error the title to the personal property situate in Massachusetts?

Did the assignment, and notice thereof to the bailee of the property, operate to vest in plaintiff in error the title to the personal property situate in Massachusetts, as against the attachment issued out of the state court of Massachusetts at the suit of the defendants in error, residents and citizens of New York and New Jersey?

To wait until the case shall be reached in its regular order on the call of the docket of this court for the questions certified to be answered will delay the determination of the case until long after the plaintiff in error had a right to expect a decision, and until long after a decision would have been rendered in the ordinary course, and in this particular instance will defeat one of the main objects of the establishment of the circuit court of appeals, i. e., that suitors might have their causes finally determined in a reasonable time and in such time that a final determination might be of some use to them, and will unduly delay the settlement of the insolvent estate and embarrass the state court in its administration of the insolvent estate. The determination of the effect to be given such assignments outside of the state where made, and whether it is competent for the courts of a sister state, under the constitution of the United States, to permit its own citizens to disregard such an assignment while denying such privilege to citizens of other states, is of considerable public importance. Also, an appellate court having a statutory right to apply to this court for information as to the law to enable it to decide a cause pending before it, it would seem that such application when made should be granted

and the information furnished at an early day so as to enable that court to dispose of the case within a reasonable time after it has been argued and submitted for decision; and especially is this so, because in such case the parties are on a different footing from those in an ordinary cause pending in this court, in that, ordinarily the parties voluntarily have resorted to this court, while in this case the parties have not brought the case into this court, but the court whose decision the parties have sought has sent the case here for its information.

For the foregoing reasons, and because in this case such special and peculiar circumstances are found as make it a proper case to be advanced on the docket under rule 26 of this court, subd. 7,—**Plaintiff now moves the court to advance said cause on the docket and set the same down for oral argument for some day in the first week of the October term, 1898.**

Edmund J. Dunnett
Attorney for Plaintiff in Error.

The defendants in error hereby waive issuance of notice of the foregoing notice and service thereof, **notice of the foregoing motion and service thereof, and respectfully ask that the motion be granted and the case advanced and set down for hearing as prayed.**

James E. Markham
Counsel for Defendants in Error.

No. 188.

Motion to Bring up Record

Filed Dec. 12, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 495.

THE SECURITY TRUST COMPANY, as Assignee of D. D. Merrill Company, insolvent,

Plaintiff in Error.

vs.

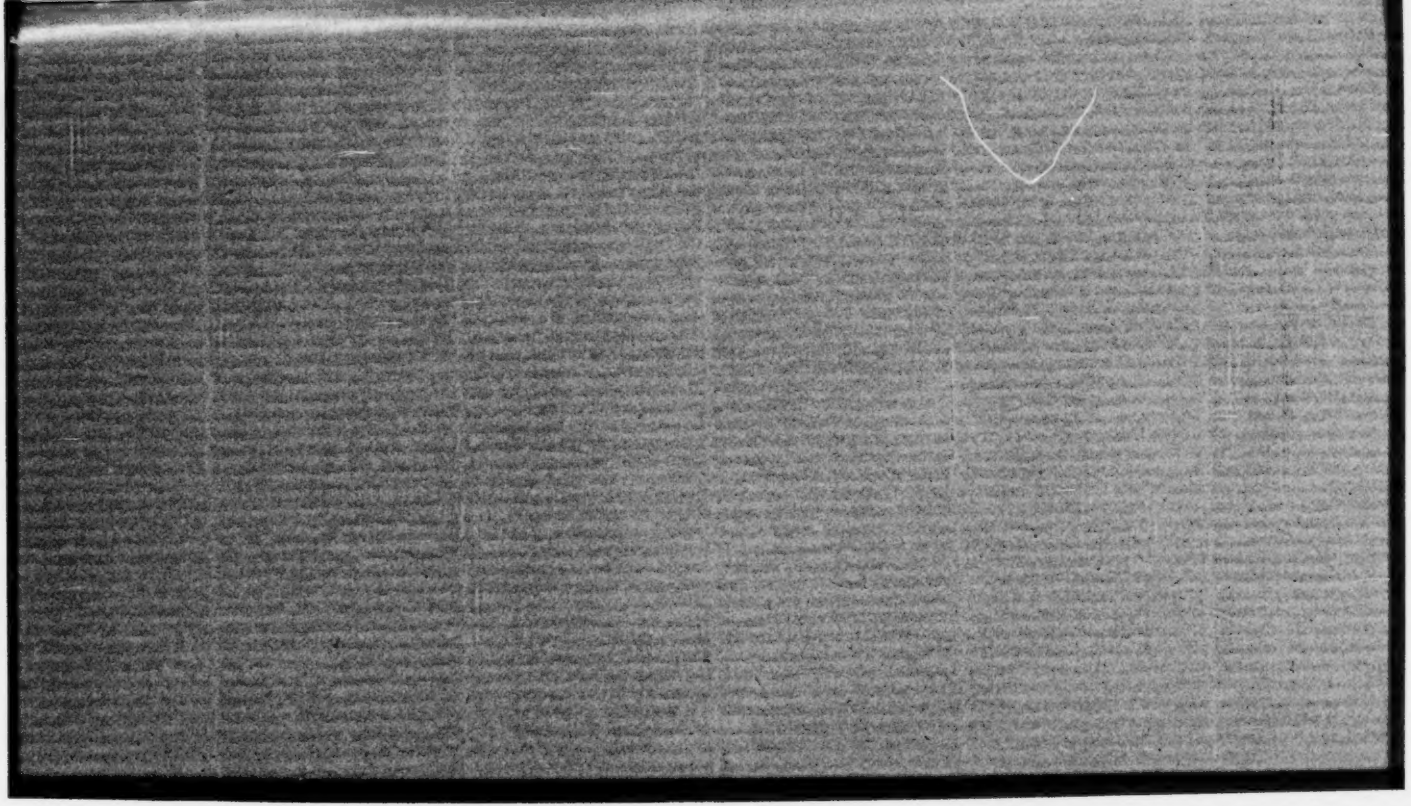
FRANK H. DODD, ET AL., copartners as Dodd, Mead & Co.,

Defendants in Error.

PETITION FOR CERTIORARI.

MARKHAM, MOORE & MARKHAM,

Counsel for Defendants in Error.



In The
Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 495.

THE SECURITY TRUST COMPANY, as Assignee of D. D. Merrill Company, insolvent,

Plaintiff in Error.

vs.

FRANK H. DODD, ET AL., copartners as Dodd, Mead & Co.,

Defendants in Error.

To the Honorable, the Supreme Court of the United States:

Your petitioners, Frank H. Dodd, Bleecker Van Wagenen and Robert H. Dodd, defendants in error herein, respectfully represent and show to this Honorable Court:

That this is a suit at law brought in the district court of the State of Minnesota, by the plaintiff in error against the defendants in error, to recover the sum of ten thousand dollars as damages for the alleged conversion of certain articles of personal prop-

erty. The defendants in error, two of whom are citizens of the state of New York, and one a citizen of the state of New Jersey, removed the cause into the Circuit Court of the United States for the district of Minnesota, where the same was tried and submitted upon the pleadings and an agreed statement of facts, upon which the circuit court gave judgment for the defendants. Thereafter on application of the plaintiff, the cause was removed by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and was argued and submitted to that court for its decision.

The Circuit Court of Appeals has certified to this court two questions or propositions of law, concerning which it desires the instruction of this court for its proper decision.

Your petitioners, under and pursuant to the act entitled, "An Act to establish circuit courts of appeals and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, now respectfully present to this Honorable Court a certified copy of the entire record of this case in the Circuit Court of Appeals, and thereupon respectfully petition this Honorable Court that it may require and direct that the whole record and cause may be sent up to it for its consideration, to the end that the whole matter in controversy between the parties in this suit may be decided by this Honorable Court.

Your petitioners respectfully represent that the agreed statement of facts upon which the cause was presented to, and decided by, the Circuit Court will be found on page 5 of the transcript of the record so certified by the Circuit Court of Appeals and presented herewith, and that the statement of facts and the certificate made by the judges of the Circuit Court of Appeals, with the questions of law concerning which the instruction of this Honorable Court is asked, appear at length in said transcript of record at pages 24 to 29 inclusive.

The questions upon which the Circuit Court of Appeals desires the instruction of this Honorable Court, are:

"First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualifications as assignee thereunder vest said assignee with the title to the personal property aforesaid then located in the State of Massachusetts and in the custody and possession of said Alfred Mudge and Sons.

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge and Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the Superior Court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had

notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim."

Your petitioners most respectfully represent that they are advised that an answer to these questions will not necessarily determine the right of the plaintiff in error to maintain this suit, and your petitioners desire to urge upon the consideration of this court that such title as the plaintiff in error acquired by virtue of the assignment from the D. D. Merrill Company under the insolvency laws of the State of Minnesota, was a qualified title at the most, which the courts of Massachusetts might recognize, by virtue of the *comity* existing between the states, or might refuse to recognize in its discretion, (Greene v. Van Buskirk, 7 Wall. 339; Paine v. Lester, 44 Conn. 196) and that the effect of the proceedings had in the courts of the State of Massachusetts in the suit in which the defendants in error were plaintiffs and the D. D. Merrill Company was defendant, was to vest in your petitioners as purchasers at the execution sale in that proceeding, a complete title to the property in controversy without respect to any other consideration whatever; and they desire to urge that the plaintiff in error, with full knowledge of the proceedings taken against the property in controversy in Massachusetts, having stood by and without any interference allowed your petitioners to proceed to judgment, and condemnation of the property by the Massachusetts court, cannot in this suit

call in question the validity of the title thus acquired, for the reason that in this suit, brought in the State of Minnesota, full faith and credit must be given to the judicial proceedings of the courts of the State of Massachusetts.

Green v. Van Buskirk, 7 Wall. 339.

The record discloses that *there was no delivery of the property* in controversy to the plaintiff in error as assignee to the D. D. Merrill Company, and under the laws of the state of Massachusetts the delivery of possession is essential to the validity of a conveyance of personal property situated in that state. Lanfear v. Summer, 17 Mass. 109; Hallgarten v. Oldham, 135 Mass. 1.

And your petitioners respectfully represent that these considerations upon the facts disclosed by the accompanying record bring this case directly within the decision of this court in the case of Green Van Buskirk, 5 Wall., 307, 7 Wall. 339, followed and approved in Hervey v. R. I. Loco. Works, 93 U. S. 664; Cole v. Cunningham, 133 U. S. 107; Lawrence v. Bachelor, 131 Mass. 504; Cunningham v. Butler, 142 Mass. 47; and that the additional circumstances that your petitioners had notice of the assignment of the D. D. Merrill Company prior to the attachment of the property in question, is not important, as the rights of an attaching creditor is in no way affected by notice, or

want of notice, of a prior assignment by the debtor. Paine v. Lester, 44 Conn. 196; Willits v. Waite, 25 N. Y. 577; Barth v. Backus, 140 N. Y. 230; Catlin v. Wilcox, 123 Ind. 477.

Your petitioners further represent that an argument and discussion of the question last suggested is essential to a complete presentation and discussion of the questions certified by the Circuit Court of Appeals to this court for its consideration, and it is desirable that while the cause is in this court the whole question in controversy between the parties be determined. The record is brief and can, without difficulty, be prepared for presentation to the court at this term in the usual course, and the briefs of counsel have not yet been prepared or printed. And your petitioners most humbly pray that this Honorable Court will grant their request that it cause the whole record in this case to be sent to this court for its consideration and decision.

JAMES E. MARKHAM,
A. R. MOORE and
GEO. W. MARKHAM,
Counsel for Defendants in Error.

DEC 15 1898
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 188.

Filed Dec. 15, 1898.

THE SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company, Plaintiff in Error,

vs.

FRANK H. DODD, BLEECKER VAN WAGENNEN and EDWARD H. DODD, Co-partners as Dodd, Mead & Company, Defendants in Error.

BRIEF OPPOSING APPLICATION OF DEFENDANTS IN ERROR TO HAVE THE ENTIRE RECORD CERTIFIED TO THE SUPREME COURT.

EDMUND S. DURMENT,
Counsel for Plaintiff in Error

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 188.

THE SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company, Plaintiff in Error,

vs.

FRANK H. DODD, BLEECKER VAN WAGENNEN and EDWARD H. DODD, Co-partners as Dodd, Mead & Company, Defendants in Error.

To the Honorable, the Supreme Court of the United States:

The above entitled action having been taken to the Circuit Court of Appeals for the Eighth Circuit on writ of error, and having been argued and submitted for decision, that court certified two questions to this court to be answered to enable the Circuit Court of Appeals to decide the case. The record on that certification was filed in the Supreme Court on the twenty-fifth day of October, 1897, and the cause was docketed and placed on the October Term, 1897, calendar. The cause is now No. 188 on the October Term, 1898, calendar, and I am informed will probably be reached for argument as early as the fifteenth day of January, 1899. The defendants in error at this late day ask that the entire record be sent up under Rule 37 of the Rules of the Supreme Court, in order that the entire case may be determined in the Supreme Court. They suggest that there is one other question than the two certified which they desire to present to the Supreme Court. There prob-

ably is more than one other question which will have to be passed upon in order to a full determination of the case.

The plaintiff in error objects to the entire record being sent up for determination of the entire case by this court at this time. The application comes entirely too late. The preparations for briefing the case have been made, and copy of a portion of the brief prepared for the printer by the plaintiff in error. It is true the brief has not yet been printed, but plaintiff in error cannot safely delay printing the brief until the determination of the application now made by the defendants in error, and the brief will probably be printed before this application can be heard by the court. Moreover, the preparation for briefing has been confined to the questions submitted by the Circuit Court of Appeals, and no other points in the case have been considered by counsel, and counsel cannot fairly be called upon at this late date, in the midst of the press of other engagements, to take up other questions in the case and prepare to brief them.

It seems to me that in all fairness the same rule as applies to *certiorari* for diminution of the record should apply in this case; that the motion should be made at the first term of the entry of the case. (See rule 14.) There is no showing of any reason for the delay in making this application, neither is there any reason shown or intimated why either party will be prejudiced or suffer any loss by leaving the questions involved in the case, other than those certified to this court, for the determination of the Circuit Court of Appeals.

For these reasons the plaintiff in error prays that the petition of the defendants in error to have the entire record certified to this court under Rule 37 be denied.

EDMUND S. DURMENT,
Counsel for Plaintiff in Error

No. 188.

Brief of Durment for

FILED
JAN 7 1899
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States.

Filed January 7, 1899.

OCTOBER TERM, 1898.

No. 188.

E SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company, Plaintiff in Error,

vs.

ANK H. DODD, BLEECKER VAN WAGENNEN and EDWARD H. DODD, Co-partners as Dodd, Mead & Company, Defendants in Error.

Brief for Plaintiff in Error.

EDMUND S. DURMENT,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 188.

THE SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company, Plaintiff in Error,

vs.

FRANK H. DODD, BLEECKER VAN WAGENNEN and EDWARD H. DODD, Co-partners as Dodd, Mead & Company, Defendants in Error.

STATEMENT.

On September 23, 1893, D. D. Merrill Company, a corporation organized under the laws of Minnesota, and doing business in that state, being insolvent, made an assignment to plaintiff in error for the benefit of its creditors, under the provisions of Laws of Minnesota for 1881, Ch. 148, as amended by Laws 1889, Ch. 30.

At the time of the assignment, certain personal property, belonging to insolvent, (stereotyped and electro-typed plates for printing books) was in Boston, Massachusetts, in custody of Mudge & Sons. The plaintiff in error duly qualified as such assignee and entered upon the discharge of its duties as such, and on September 25, 1893, the following notice was served on Mudge & Sons, at Boston, viz:

"Alfred Mudge & Sons,
24 Franklin St., Boston, Mass.

Gentlemen:

I hereby notify you that for Security Trust Company, assignee, I take possession of the plates of the D. D. Merrill Company in your hands.

(Signed.) GEORGE EARNEST MERRILL."

At the time of making said assignment, D. D. Merrill Company was indebted to the defendants in error, all of whom were at all times citizens and residents of the state of New York, on certain acceptances aggregating $1249.98, and also to said Alfred Mudge & Sons, on a certain promissory note for $126.80. On March 1, 1894, Alfred Mudge & Sons duly sold, endorsed and delivered said promissory note to the defendants in error. Thereafter, the defendants in error, citizens and residents of New York, commenced an action in the Superior Court for Suffolk county, Massachusetts, against D. D. Merrill Company, to recover on said note and acceptances, and, a writ of attachment, issuing in said action, the personal property above mentioned (it then being in the possession of Alfred Mudge & Sons, in Boston, Mass.) was seized by the sheriff of that county on March 8, 1894, under the attachment, as the property of said D. D. Merrill Company. Prior to that date the defendants in error and also Mudge & Sons, had knowledge and notice of the assignment. In that action the summons was served on D. D. Merrill Company by publication, judgment entered and such personal property sold to the defendants in error on September 27, 1894, as the property of said company, under execution issued on the judgment. Security Trust Company, assignee, the plaintiff in error, was not a party in that action and did not appear therein.

Claiming that said attachment, judgment, execution and sale

were illegal and amounted to a conversion of the property, Security Trust Company, as assignee, filed a complaint and issued summons in an action in the District Court for Ramsey county, Minnesota, against the defendants in error, to recover for such conversion of the property. Thereafter the defendants in error removed said action to the United States Circuit Court for the District of Minnesota, Third Division, and duly appeared and answered the complaint in the action. Thereupon the parties stipulated certain facts in writing and filed the stipulation, which it was agreed might be read in evidence on the trial, and the defendants in error moved for judgment on the pleadings and facts stipulated. The court granted the motion, and, pursuant to the order of the court made on such motion, judgment was entered August 18, 1896, in favor of the defendants in error, that plaintiff in error take nothing by the action, dismissing the action on the merits and for $33.10 costs.

Thereupon the plaintiff in error sued out a writ of error to the Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment. That court certifies that it desires the instruction of the Supreme Court upon the following questions and propositions of law arising upon the record, to-wit:

First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder vest said assignee with the title to the personal property aforesaid then located in the State of Massachusetts and in the custody and possession of said Alfred Mudge and Sons.

Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice

of such assignment which was given, as aforesaid, to Alfred Mudge and Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully siezed by attachment under process issued by the Superior Court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim.

The deed of assignment involved, which was duly executed, acknowledged and delivered, was as follows, viz:

Copy of Deed of Assignment.

This indenture, made this 23rd day of September, A. D. 1893, between D. D. Merrill Company, a corporation, party of the first part, and the Security Trust Company, a corporation created and existing under the laws of the State of Minnesota, and having its principal place of business in the county of Ramsey and said State of Minnesota, party of the second part.

Whereas, said party of the first part is justly indebted to divers and sundry persons in considerable sums of money, and by reason of losses and misfortunes has become and now is insolvent, and is desirous of making a fair and equitable distribution of its property and effects among its creditors, according to law and the statutes in such cases made and provided.

Now therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises and the sum of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, [had] granted, bargained, sold, conveyed, [transferred], set over and assigned, and by these presents does grant, bargain, sell, convey, trans-

fer, set over, assign and deliver unto the said Security Trust Company, party of the second part, its successors and assigns, all the lands, tenements, hereditaments, appurtenances, goods, chattels, choses in action, claims, demands, property and effects belonging to the party of the first part, wherever the same may be situated, and of whatever name or nature, except such property as is exempt from attachment or sale on execution.

To have and to hold the same, and every part and parcel thereof with the appurtenances, unto the said party of the second part, its successors and assigns.

In trust nevertheless, that the said Security Trust Company shall forthwith take possession of the said premises, property and effects hereby assigned, and shall sell and dispose of the same with all reasonable diligence and convert the same into money, and also collect all such debts and demands hereby assigned, as may be collectible and with and out of the proceeds of such sales and collection shall

First. Pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, including the reasonable and lawful compensation of the party of the second part for its services in executing the said trust;

Second. Pay and discharge in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter one hundred and forty-eight of the General Laws of the State of Minnesota, for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not

be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such cases made and provided, and if after the payment of all the costs, charges and expenses attending the execution of said trust and the payment and discharge in full of all the said debts of the said party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then,

Third. Repay such surplus to the party of the first part, its successors and assigns.

And for the more effectual execution of the trust hereby created, the party of the first part does hereby [made], constitute and appoint the party of the second part its true and lawful attorney irrevocable, with full power and authority to do and perform all acts, deeds, matters and things which may be necessary to the full execution of said trust, and for the purpose of said trust to ask, demand, recover and receive of and from all and every person or persons, all the property, debts and demands belonging to the party of the first part, and to give acquittances for the same, and to sue, prosecute, defend and implead the same, and to execute, acknowledge and deliver all deeds and instruments of conveyance necessary and proper for the better execution of said trust.

In testimony whereof the said insolvent has caused these presents to be signed by its president and secretary and its corporate seal to be hereunto affixed this 23rd day of September, A. D. 1893.

(Corporate Seal)

D. D. MERRILL COMPANY,
By D. D. MERRILL,
President.
By LEAVITT K. MERRILL,
Secretary.

ARGUMENT.

The questions certified to the Supreme Court amount to this: How far was the deed of assignment valid and effectual in the State of Massachusetts?

The plaintiff in error claims that assignments of personal property which are valid by the law of the domicil of the assignor are valid in the state where the property may be situated, unless they violate its statutory law or its known settled policy, and that the rule applies to assignments for the benefit of creditors

The defendants in error concede the rule in cases of voluntary assignments, but claim that it does not obtain in cases of involuntary assignments, nor in cases which they term statutory assignments. They contend that the assignment here in question is an involuntary or statutory assignment, that the rule above stated has no application, and that the assignment has no valitidity in the State of Massachusetts. The plaintiff in error asserts that it is a voluntary assignment, and that it was in Massachusetts valid and effectual to pass to the assignee the title to personal property in Massachusetts even though it be held that it is not a voluntary assignment.

This assignment was authorized in Minnesota by *Laws 1889, Ch. 50, Sec. 1*, which section reads as follows:

"That section one (1) of the act entitled 'An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors, be, and the same is hereby amended so as to read as follows: Section 1. Whenever any debtor shall have become insolvent, or garnishment shall have been made against any debtor, or property of any debtor shall have been levied upon by virtue of an attachment, execution or legal process issued against him for collection of money, he may make an assignment of all his unexempt property, for the equal benefit of all his bona fide creditors,

who shall file releases of their demands against such debtors, as herein provided; such an assignment shall be made, acknowledged and filed, in accordance with and be governed by the laws of this state relating to assignments by debtors for the benefit of creditors, except as herein otherwise provided; and such assignment, if made within ten days after garnishment shall have been made against the assignor, or within ten (10) days after property of such assignor shall have been levied upon by virtue of an attachment, execution or other legal process against him for collection of money, as aforesaid, shall operate to vacate every garnishment and levy then pending, and to discharge all property therefrom, upon qualification of the assignee, or his successor, as provided by law, unless he shall, within five days thereafter, file in the office of the clerk of the court, where such assignment was filed, notice of his intention to retain all pending garnishments and levies; in which case the same shall inure to the benefit of the creditors under such assignment, and may be prosecuted by such assignee and his successors; provided, however, that such assignment shall not vacate or affect any levy made by virtue of an execution issued on a money judgment entered against such debtor on a complaint which was on file during at least twenty (20) days next prior to entry of such judgment in the court in the county where the defendant resided meanwhile; and provided, further, that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor or otherwise for the same debt."

It will be noticed that the provisions of this law are not mandatory; that the law does not require the debtor in any case to make an assignment, and no court has jurisdistion to compel such assignment to be made; that it is not made in the course of any legal proceeding, nor as the result of any such. It is also true that in Minnesota the debtor wishing to assign his property for the benefit of his creditors, may choose between making his assignment under the provisions of the section above mentioned, or making it under the provisions of *Gen. Stat. 1878, Ch. 41, Sec. 23.* The difference between the two is that under the first mentioned statute he may require the creditor to file a release of his claim as a condition of participating in the

fund, while under the other there is no such requirement. An assignment under *Laws of 1889, Ch. 30, Sec 1*, is clearly the voluntary act of the debtor, and the deed of assignment in this case purports to be the voluntary act of the debtor. But the defendants in error claim that the condition requiring the creditor to file releases makes it involuntary as to the creditor, and would render it invalid by the common law in Minnesota, and that therefore it must be held to be an involuntary or statutory assignment, and of no force without the State of Minnesota.

It is true that in some of the Minnesota cases the court of that state has declared that an assignment requiring releases by the creditor is involuntary as to the creditor, and in one case has said that such a condition renders the assignment invalid at common law. But notwithstanding those decisions that court has always held such an assignment authorized by our statute to be a voluntary assignment and effectual to convey the personal property of the assignor in every place, and especially has it so held in all its late decisions.

64 Minn. 18, Hawkins v. Ireland.
55 Minn. 345, Covey v. Cutler.
41 Minn. 327, Stahl v. Mitchell.

What validity and effect is to be given to this assignment in Massachusetts, we submit, is to be determined not by the laws of Minnesota, but by the laws of Massachusetts. This assignment does not violate any statutory law of Massachusetts. No statute of that state undertakes to regulate or determine what shall be a valid assignment when made in another jurisdiction. No statute of that state prescribes what effect shall be given in Massachusetts to any assignment made in another jurisdiction. Neither is this assignment in violation of the known set-

tled policy of that state. A comparison of the statutes of Minnesota regulating assignments of this character and of the terms of this deed of assignment, with the statutes of Massachusetts having reference to assignments, shows that the provisions of this deed of assignment are substantially such provisions as are allowed in assignments in Massachusetts, and that so far as the policy of that state is disclosed by its statutory enactments, this assignment does not contravene that policy but is in accord with it.

In Massachusetts, by Pub. Statutes, ch. 157, it is provided:

Sec. 17. The assignment carries all property not exempt from attachment.

Secs. 103, 104. Preferred claims include the preferences allowed in Minnesota, and the balance is distributed among unpreferred claims, in proportion to the claims.

Sec. 81. Provides for discharge from debts.

In Minnesota, by Gen. Stat. 1894, it is provided:

Sec. 4240. The assignment must be of al. unexempt property.

Sec. 4251. Preferred claims are all such as are allowed preference in Massachusetts, and balance is distributel among unpreferred claims in proportion to the claims.

Secs. 4240, 4249, also provide for discharge from debts.

The procedure is similar in the two states. The assigned estate is distributed under the direction of a court and all claims must be proved under oath. The assignee in each state may sue to avoid fraudulent conveyances and preferences, and ample opportunity is given in each state to creditors to receive dividends without releasing the debtor, if his conduct has been fraudulent.

But even though the statutes in Minnesota differed in substantial provisions from the Massachusetts statutes, it would not indicate that the assignment is opposed to the policy of the State of Massachusetts, nor in violation of its statutory provisions. It is possibly true that this assignment, if made in Massachusetts, could be avoided under the Massachusetts statute, but that is not sufficient to make it contrary to the statutes or policy of that state. It is held in Massachusetts, and quite generally in other jurisdictions, that statutes of the state have

but little, if any, weight in determining whether a foreign assignment is effectual to pass personal property in the state; that the statutes of a state are enacted for resident debtors and have no reference to foreign assignments.

The Massachusetts decisions clearly declare the validity in Massachusetts of this assignment.

155 Mass. 114, Frank v. Bobbitt.
137 Mass. 366, Train v. Kendall.
111 Mass 206, May v. Wannemacher.
11 Gray 37, Martin v. Potter.
162 Mass. 190, Sawyer v. Levy.

In the Circuit Court of Appeals it was urged by the defendants in error that only such assignments made in other jurisdictions as would be good by the common law in Massachusetts would be valid in Massachusetts, and that this assignment is invalid by the common law in Massachusetts, because it does not appear to have been assented to by any creditors, and because it contains a condition for releases by the creditors.

As to the proposition that creditors had not assented it may be said:

1. The lower court has certified two questions to this court, and upon that certificate this court must assume that creditors, other than defendants in error, had assented to the assignment.

2. The plaintiff in error claims that under the stipulation of facts filed in the Circuit Court it had the right to have a trial of the action and to give evidence that creditors had assented to the deed of assignment prior to the attachment made by defendants in error. Whether it had such right is one of the questions now pending a decision in the Circuit Court of Ap-

peals. This court must therefore assume that creditors had assented to the deed of assignment.

3. The same objection was expressly urged in *155 Mass. 114, Frank v. Bobbitt*, but it was overruled by the court, and such objection has never been sustained in Massachusetts, except in favor of creditors domiciled in that state.

On the proposition that the condition requiring creditors to file releases renders the assignment invalid at common law, we submit that by the common law in Massachusetts, and under the decisions of the Federal Courts, the condition requiring releases is simply a method of giving preferences and does not render the assignment invalid.

Story's Equity Jurisprudence, vol. 2, sec. 1036.
3 Price (Exchequer) 6 The King v. Watson.
13 Fed. Rep. 872, Mathers v. Nesbit.
7 Peters, 608. Brashear v. Bennett.
128 U. S. 489, Denny v. West.
5 Rawle 221, Thomas v. Jenks.
11 Fed. Cases 295 (4 Mason 206), Halsey v. Fairbanks, (Opinion by Judge Story.) See pp. 303, 304.
5 Mass. 42, Hatch v. Smith.
19 Pick. 281, Nostrand v. Atwood.
5 Pick. 28, Andrews v. Ludlow.

In *13 Fed. Rep., Mather v. Nesbit*, the court shows that the effect of the clause to release is simply a preference. Nelson, J., says, on page 873:

"The insolvent law of Minnesota does not grant a discharge of the debtor on surrender of all his property to an assignee or receiver. The courts are open to any creditor who is not disposed to become a party to the insolvency proceedings, and unless a creditor gives a release to his insolvent debtor he can bring suit

and obtain judgment; but a priority is given to creditors who will release the debtor over those who stand back and do not accept the conditions under which the insolvent's property passes to the assignee or the receiver, and they only can receive dividends from the estate."

In *7 Peters, Brashear v. West*, such clause was held not to invalidate the assignment. The decision was grounded on the holding of the Pennsylvania court, in which state the cause arose. The court seems to be in doubt how the decision ought to go on principle.

In *128 U. S., Denney v. Bennett*, considering the provision of the Minnesota statute relating to releases, the court clearly considered such provision to be in the nature of a lawful preference and said on pp. 495, 496:

"The power is conceded, when not forbidden by the statutes of a state, to a failing debtor to make a general assignment of his property for the benefit of his creditors, as this one does. It is further admitted that in such an assignment, if there be nothing fraudulent otherwise, he can prefer some creditors over others, and that he can secure to some payment in full, while he leaves others who will certainly get nothing out of his estate. When this is done, the creditors who are not provided for in the assignment are left in a worse condition than they are where it is done under the present law, because in the first instance they would certainly get nothing out of the debtors property, though they would retain a right to proceed against him by a judgment and execution; while in the present case they have the option of pursuing that course, or of coming in with the other creditors, executing releases, and obtaining their share of the property assigned. Here, instead of naming the preferred creditors, the assignor gives his property to all who will execute a release of their claims against him. Nobody is required by the statute to do so unless he thinks it is to his interest. The creditor who executes such a release gets his share of the property assigned, while the one who does not receives nothing, unless there may be a surplus left after the payment of the releasors; but he is not hindered or delayed in obtaining a judgment against the debtor, or in levying upon other property, if

such can be found, not conveyed by the instrument, or upon any afterward acquired by the debtor. The latter remains liable, notwithstanding this statute and this assignment, as he always was, for the debt of the non-assenting creditor."

In *27 Fed. Rep.*, *Schuler v. Israel*, the assignment contained a provision requiring releases as a condition of receiving dividends—yet Judge Brewer says of it:

"Valid in Texas, where it was executed, it must be considered valid here, save as it conflicts with the rights of resident creditors."

In *5 Rawle, Thomas v. Jenks*, the court said, on pages 224, 225:

"The difficulty is to understand how he may lawfully manage his right to give a preference in such a way as to secure an advantage to himself in the release of his person and future earnings. And the solution of it is found in the arbitrary control over the order of payment allowed him by the common law, and not restrained by the 13 Elizabeth; which, suffering him to postpone any creditor to the rest, makes participation of the fund before those he may choose to prefer are served, not so much matter of right as of favor. To let a creditor in among the first, therefore, though on condition that he release the unpaid residue of his debt, may be to him a favor instead of a wrong, which may consequently be extended to him on terms, or not at all. Having an unquestionable power of preference of which he is the absolute master, it follows that he may set his price on it, provided it be not a reservation of part of the effects for himself, or anything that would carry his power beyond mere preference."

Thomas v. Jenks is published as a leading case in *1 American Leading Cases* (Hare & Wallace) and in the notes to the case (5th ed., p. 83) the editors seem to understand that in Massachusetts such provision for release does not invalidate the assignment. Judge Story so understood the law to be in Massachusetts as appears from his opinion in *Halsey v. Fairbanks*, (*11 Fed. Cases*) and his equity jurisprudence (*Vol. 2, Sec. 1036 and cases cited there*) above referred to.

In *5 Mass.*, *Hatch v. Smith*, the court said (p. 50):

"There was certainly nothing wrong, when Smith found himself in insolvent circumstances, to disclose his situation to his creditors, and to propose to pay them, in equal proportion, as far as his ability extended; and to obtain therefor a discharge from his debts. On the part of his creditors there was nothing iniquitous in acceding to such a proposal. And if there were any of Smith's creditors, who disliked the terms which were offered, and preferred the chance of obtaining satisfaction by other means, it was competent and right for them to refuse. But there seems no good reason why such refusal should prevent Smith and the other creditors from executing an accommodation, which appears so humane and just."

It was also urged by defendants in error, that this is a statutory assignment; that is to say, it is an assignment in bankruptcy having no force except by virtue of the statute, which is in fact a bankrupt act, and that such statute has no effect beyond the limits of the state. To this proposition we answer:

1. It is not true that such statutes have no effect beyond the borders of the enacting state. Such statutes are binding on the resident debtor, and an assignment made by the debtor at the place of his domicil under such statute, whether it be his voluntary act or the result of legal compulsion, is binding upon him and operates to transfer, as against himself, his personal property wherever situate. He can not in another state claim the property as against his assignee. Probably a purchaser from him with knowledge of the assignment cannot. However, it may well happen, and usually does, that in the foreign jurisdiction such an assignment will be held fraudulent as to certain classes of persons, just as a conveyance may be held to be void for fraud as to some persons and valid as to others, even in the courts of the domicil. If such assignment violates the statutory law of the foreign state, then of course to give it effect would be in fraud of the law

of the state and of every person in the state, and it will in that jurisdiction be void. If by the settled policy of the state, such an assignment be in fraud of the rights of particular classes of persons only, then it is void as to those classes and valid as to all others.

2. It is not true that this assignment has no force except by virtue of the statute. The assignment exists and has its force by reason alone of the debtor's act, by reason of the fact that it is the debtor's contract. The provision for releases (which is the provision it is claimed renders the act obnoxious to the objection) owes its existence to the contract of assignment and in the absence of such provision in the assignment no such condition could be claimed. (See *42 Minn. 22, In the Matter of Fuller*). The only effect of the statute is to provide that it shall be legal for the debtor to make such contract. It is a similar case to statutes regulating the rate of interest. In A state it is lawful to contract for twelve per cent per annum interest. In B state it is unlawful to contract for more than seven per cent. Yet a contract made in state A to be performed there, calling for twelve per cent per annum interest, will be enforced in state B. This, because it is so provided by the terms of the contract and not because of the statute of state A.

To give effect to this assignment in Massachusetts is not to give effect to the statute of Minnesota, but to give effect to the contract of assignment, and to do so because it is a contract not in violation of the statutory laws or the settled policy of the state of Massachusetts.

3. The Minnesota statute is not a bankrupt act.

In *111 Mass. 202 May v. Wannemacher*, and in *137 Mass. 366, Train v. Kendall*, and in *11 Gray, 37, Martin v. Potter*

asignments which depended upon statutory provisions of other states were recognized as valid in Massachusetts.

In *21 How, 144, Livermore v. Jenckes* an assignment substantially such as this, executed in Rhode Island, was held to convey the personal property of the assignor in New York as against creditors resident in New York.

In *3 How, 509, Black v. Zacharie*, the rule is stated in general terms that the law of the owner's domicil is to determine the validity of the transfer or alienation of personalty, unless there is some positive or customary law of the country where it is found to the contrary. It is not intimated that the rule does not apply to transfers which would be invalid but for the provision of some statute in force at the domicil.

In *32 Fed. Rep. 279, Halsted v. Straus*, Justice Bradley held that an assignment made in New York and valid there operated to transfer the title to personalty in New Jersey, though the assignment was such as would have been invalid under the laws of New Jersey, as against a creditor firm of the insolvent one of the members of which firm was a citizen of New Jersey.

27 Fed Rep. 851, Schuler v. Israel, involved an assignment containing a condition requiring releases, which was made pursuant to a statute of Texas permitting such an assignment (*Sayles' Texas Civil Statutes, title 7a, Art. 65c, Vol. 1, page 62.*) It was held to be valid in Missouri, Brewer, J., saying, "4. Valid in Texas, where it was executed, it must be considered valid here, save as it conflicts with the rights of resident creditors. Burrill on Assignm. (3rd. ed.) § 310, and cases cited."

In *128 U. S. Denny v. Bennett, (p. 498)* the court, in considering this Minnesota statute, says:

"* * * The authority to deal with the property of the debtor within the state so far as it does not impair the obligation of contracts, is conceded, but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court."

"The Minnesota statute makes no provision for any such release. The creditor who became such after the statute was passed cannot complain that the obligation of his contract is impaired, because the law was a part of the contract at the time he made it, nor can he say that his contract is destroyed and the debtor discharged from it, which is of the essence of a bankrupt law, because no such decree can be made by the court, neither does the law have any such effect, though the obligation of the debtor may be cancelled or discharged by the voluntary act of the creditor who makes such release for a consideration which to him seems to be sufficient."

The defendants in error insisted that plaintiff in error's claim of right to recover in this action rests upon the decisions of the Massachusetts court holding that the title of an assignee under an assignment made in another state will be sustained as against a claim made by one not a citizen of Massachusetts, but will not be sustained as against a citizen of Massachusetts. And they insist that it is not competent for the Massachusetts courts thus to discriminate between its own citizens and citizens of another state. They base their contention on *7 Wall. 139, Green v. Van Buskirk.* We are not prepared to admit that the Massachusetts courts would not sustain the assignee's title as against a citizen of Massachusetts, but whether it would is immaterial. It is settled by the decisions of this court that the case of *Green v. Van Buskirk* does not sustain their contention, and that it is competent for the Massachusetts court to thus discriminate.

133 U. S. 107, Cole v. Cunningham.

We suggest that one ground upon which such discrimination properly may be made is this:

The removal by the assignee of property situate in Massachusetts, thus compelling the citizen of Massachusetts to resort to a foreign jurisdiction to assert his claim, may well be held to be in fraud of the Massachusetts creditor, though not fraudulent as to a foreign creditor who goes into Massachusetts solely for the purpose of availing himself of Massachusetts process to seize the goods.

We submit that the questions certified must be answered in the affirmative.

EDMUND S. DURMENT,
For Plaintiff in Error.

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JAMES H. McKENNEY,
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No. 188.

Brief of Markham for D. E.

Supreme Court of United States

OCTOBER TERM, 1898.

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Filed Jan. 20, 1899.

THE SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company,

Plaintiff in Error.

vs.

FRANK H. DODD, BLEECKER VAN WAGENEN and ROBERT H. DODD, Co-partners as Dodd, Mead & Company,

Defendants in Error.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

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Review Publishing Co., St. Paul, Minn.

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The questions presented for the consideration of this court as appears from the certificate, are these:

"First. Did the execution and delivery of the deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualifications as assignee thereunder vest said assignee with

the title to the personal property then located in the state of Massachusetts and in the custody and possession of Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, together with the notice of such assignment which was given to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the state of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

By these interrogatories, we assume that the court of appeals desires to be advised whether the proceedings had by the defendants in error in the state of Massachusetts, in the manner and under the circumstances related, were lawful or tortious, for we think there is a well recognized distinction between the rule of law to be applied in a case where the assignee claiming title to the property by virtue of an assignment executed in another state, intervenes in the original proceeding in the state where the property is seized, or takes other appropriate and timely proceedings *in that state* for the assertion of his right as against the *conflicting* right of the attacking creditor and the rule to be applied in a case where he stands by with full knowledge of the proceedings being taken and allows the attaching creditor to reduce the

property to possession and to perfect his lien by judgment and sale on execution, and then brings an action for the conversion of the property so attached. In the first case he appeals to the equity of the court; in the second he stands upon a strict legal right.

This distinction is recognized by the courts of Massachusetts, particularly in the case of Lawrence v. Bachelor, 131 Mass. 504, where the assignee of an insolvent debtor in Massachusetts had brought suit against another Massachusetts citizen who had gone into other states and attached property of the insolvent debtor and sold it in satisfaction of his debt. The assignee insisted that inasmuch as the courts of that state would enjoin its citizens from proceeding against the property of the insolvent debtor, who had made an assignment under the laws of that state, if timely asked to do so, that it would require such citizen who had gone abroad and recovered money from the property of the insolvent, to turn the same over to the assignee, but the court held that this contention could not prevail. The court, by Justice Field, said:

"The argument of the plaintiffs in the case at bar is, that, as it was contrary to equity for the defendant to proceed with his suits to judgment and to a satisfaction of the judgments from the funds attached, so it is contrary to equity for him to retain the money so obtained; and that they can maintain an action at law against the defendant for money had and received to their use, because the money *ex aequo et bono* belongs to them. This argument rests on the assumption that courts of law will afford a remedy in damages for all wrongs done, which courts of equity, if seasonably applied to,

will prevent; but this is not true. Courts of equity recognize and enforce rights which courts of law do not recognize at all; and it is often on this ground that defendants in equity are enjoined from prosecuting actions at law."

"In the case at bar the title to the credits attached, which pass to the assignees by virtue of the proceedings in insolvency, whether it be regarded as a legal or an equitable title, was a title subject to attachments. As neither the common law nor our statutes give any right of action on the facts agreed in this case, the assignees cannot maintain their suit if the attachments were properly made."

This rule is cited with approval in the subsequent case of Cunningham v. Butler, 142 Mass. at page 51. And at page 49 the court, in its opinion, in distinguishing that case, which was instituted to restrain the creditor from proceeding against the property by attachment, comments at length upon the fact that in the case of Green v. Van Buskirk, 5 Wall. 307 and 7 Wall. 139, the plaintiff stood by and did not avail himself of the privilege of intervening in the attachment suit in the state of Illinois.

And in this same case of Cunningham v. Butler, which came to this court upon writ of error from the court of Massachusetts, under the title of Cole v. Cunningham, (133 U. S. 107) Chief Justice Fuller, in commenting upon the case of Green v. Van Buskirk, supra, said:

"It will be perceived that it was manifestly inadmissible to hold that after Van Buskirk had permitted Green to go to judgment in a proceeding *in rem* which appropriated the property as belonging to Bates, he could then get judgment against Green for the conversion of what had so been adjudged to him, an adjudication which Van Buskirk had vo'un-

tarily declined to litigate in the proper forum, and had not sought in his own state to prevent. It was a contest between two individuals claiming the same property, and that property capable of an actual *situs* and actually situated in Illinois. The attachment was not only levied in accordance with the laws of Illinois, but the laws of the state affirmatively invalidated the instrument under which Van Buskirk claimed. Clearly, then, the law of the domicil of Van Buskirk, Green and Bates could not overcome such registry and other positive laws of Illinois as were distinctively coercive. Hervey v. R. I. Locomotive Works, 93 U. S. 664; Walworth v. Harris, 129 U. S. 355."

And in the case of Green v. Van Buskirk, 7 Wall. 139, Justice Davis, in discussing this point, says:

"It should be borne in mind, in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defense. Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But, as by the law of Illinois, Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows than when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another state for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a state the power to regulate the transfer of personal property within its limits, and to subject such property to legal proceedings."

The language used by the Supreme Court of Kansas in a case decided in that court in 1897 is particularly applicable to the facts of the case at bar. In that case the plaintiff brought an action in the state of Kansas for damages for the unlawful taking by attachment of certain chattels belonging to him situated in the state of Arkansas; the property seized being exempt by the laws of Kansas where the plaintiff lived but not by the laws of Arkansas, where seized. The defendant, the attaching creditor in the original suit, was a citizen of Missouri—a situation similar as to parties to that which we have here. The court, in its opinion, said:

"It is difficult to see how it can be a tort for a resident of Missouri to sue a citizen of Kansas in the state of Arkansas, for a debt admitted to be owing and due, and in such action to take property which is exempt in Kansas, but not exempt in Arkansas, by attachment, to satisfy the judgments obtained in such action. There being no tort, no liability would ensue. Besides, it is evident that if the proposition now pressed by plaintiff is correct, it ought to have been presented to the court in Arkansas as a defense in that action, and plaintiff ought to be bound by the adjudication made by that court, if he has negligently failed to present to it the defense which, from his argument we must infer, he now claims would have been good and complete. The petition shows that the plaintiff gave the court no intimation that he claimed the property seized as exempt. That was the time and place for such action on his part, but he chose to omit it. See 1 Van Fleet, 159; 1 High on Injunction (2nd Ed.) 114; Green v. Van Buskirk, 5 Wall. 307; 7 Wall, 139; Railway v. Thompson, 31 Kas. 180; 1 Pac. Rep. 622."

Williamson v. Kansas & Texas Coal Co., 50 Pac. Rept. 106.

See also Moore v. R. R. Co., 43 Ia. 385.

The plaintiff in error not only stood by, with full notice of the proceedings taken in the attachment suit, and allowed the defendants in error to perfect their lien by proceeding to judgment, and condemnation of the property by the courts of Massachusetts, by execution and sale, but neglected for a period of about six months, which expired between the date of the assignment and the attachment, to take any proceedings to obtain possession of the property.

For an answer to the questions asked by the Court of Appeals we must look mainly to the law of the state of Massachusetts, as construed and declared by the courts of that state, where the property in question was situate at the time of the alleged conversion thereof. For, notwithstanding the ancient, and oft repeated fiction of law, that the domicil draws to it the personal estate of the owner, wherever situated, it is well settled that each state has the right to determine, as regards property situated within its borders, what effect, if any, shall be given to a foreign assignment, whether voluntary or involuntary. And the recognition of such an assignment for any purpose, or to any extent, being wholly *an act of comity* and *not a recognition of a legal right*, each state has the right to determine for itself whether the claim of a foreign assignee will be recognized at all, or if so, whether such claim will be held superior or inferior to the rights of an attaching creditor, pursuing his

remedy against such property, in the usual course of procedure, in the courts of that state.

This is laid down by Story, in his work on Conflict of Laws, as the settled rule of law in this country. In considering this question, he says:

"It will be unnecessary to discuss the matter at large, as to personal property, since the general doctrine is not controverted that, although movables are for many purposes to be deemed to have no *situs* except that of the domicil of the owner, yet this being but a *legal fiction*, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property. One of the grounds upon which, as we have seen, jurisdiction is assumed over non-residents, is through the instrumentality of their personal property, as well as of their real property, within the local sovereignty. Hence it is that, whenever personal property is taken by arrest, attachment or execution, within a state, the title so acquired under the laws of the state is held valid in every other state; *and the same rule is applied to debts due to non-residents, which are subjected to the like process under the local laws of a state.*"

Story, Confl. Laws, Sec. 550.

"In regard to title of executors and administrators derived from grant of administration in the country of the domicil of the deceased, it is to be considered that that title cannot *de jure* extend as a matter of right beyond the territory of the government which grants it, and the movable property therein. As to movable property situated in

foreign countries, the title, if acknowledged at all, is acknowledged *ex comitate* and of course it is subject to be controlled or modified as every nation may think proper with reference to its own institutions and its own policy and the rights of its own subjects."

Story, Confl. Laws, Sec. 512.

"No one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be justly deemed open to the reproach of being founded in a narrow and selfish policy."

Story, Confl. Laws, Sec. 390.

And this court, in the case of Hervey v. R. I. Loco. Works, 93 U. S., 664, said:

"The liability of property to be sold under legal process, issued from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of the property lawful in that jurisdiction, respected in the courts of the state where it is found, and it is only on the principle of *comity* that it is ever allowed, but this principle yields when the laws and policy of the latter state conflict with those of the former."

In the case of Green v. Van Buskirk, it is held that the laws of the state of Illinois, where the property in controversy when seized was situated,

and not the laws of New York, the domicile of the owner of the property, must prevail. The court said:

"There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicil of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sovereignties. The learned author of the Commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research. And it may be conceded that as a question of comity, the weight of his authority is in favor of the proposition that such transfer will, generally, be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. The courts of Vermont and Louisiana, which have given this question the fullest consideration, have, however, either decided adversely to this doctrine or essentially modified it. Thayer v. Boardman, 25 Vt. 589; Ward v. Morrison, 25 Vt. 393; Emerson v. Partridge, 27 Vt. 8; Olivier v. Townes, 2 Mart. (N. S.) 93; Norris v. Mumford, 4 Mart. 20. Such also seems to have been the view of the Supreme Court of Massachusetts. Lanfear v. Sumner, 17 Mass. 110.

"But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws prescribe to its courts a different rule."

Green v. Van Buskirk, 5 Wall. 307.

To the same effect are Green v. Van Buskirk, 7 Wall. 139; Lanfear v. Sumner, 17 Mass. 110; Ingraham v. Geyer, 13 Mass. 146; Zipcey v. Thompson, 1 Gray, 245; Pierce v. O'Brien, 129 Mass. 314; Hallgarten v. Oldham, 135 Mass. 7; Paine v. Lester, 44

Conn. 196; Milne v. Moreton, 6 Binney (Pa) 352; Graham v. First Nat. Bank, 84 N. Y. 393; Herbernia Bank v. Lacombe, 84 N. Y. 367; Warner v. Jaffrey, 96 N. Y. 248; Denney v. Faulkner, 22 Kans. 80, and authorities cited in these cases.

The Supreme Court of Minnesota, in discussing the effect to be given to an assignment under the insolvency act here under consideration, upon the property of the debtor situated in Wisconsin, said:

"We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another state, is to be determined exclusively by the laws of Wisconsin, the *situs* of the property."

Jenks v. Ludden, 34 Minn. 482.

There are numerous cases which hold by way of extension of the general rule, originally restricted to transfers by way of bargain and sale, that, by virtue of the *comity* which exists between different states of the Union, *a general voluntary assignment* of a debtor's property, for the benefit of his creditors, valid by the law of his domicil, *and not in conflict with the express enactments or the settled policy of the sister state*, where the property is situated, will be recognized in the courts of that state as effectual to transfer to the assignee the right to the possession of such property as against a stranger or as against a subsequent attaching creditor, but this rule, even in this restricted sense, has never prevailed to its full extent in the state of Massachusetts, for the courts of that

state have repeatedly and persistently refused to recognize the right of a foreign assignee to withdraw the property of the insolvent debtor from the state, to the injury or prejudice of Massachusetts creditors, especially so when the assignment has not been assented to by the creditors. Lanfear v. Sumner, 17 Mass. 110; Edwards v. Mitchell, 1 Gray, 239; Fall River Iron Works v. Croads, 15 Pick. 11; Pierve v. O'Brien, 129 Mass. 314; Faulkner v. Hyman, 142 Mass. 53, and cases cited.

But in no state will a foreign assignment be recognized when *not* made in conformity with the provisions of the laws of the state where the property assigned is situated, or if the provisions of the assignment are inconsistent with, or repugnant to the positive law or settled policy of that state, if its validity is called in question by creditors of the original owner, *for where comity* and the *positive laws* of the foreign state where the property is situated come in conflict, the former must yield to the latter.

2 Kent's Com., 555, 599; Story on Confl. Laws; Burrill on Assignment, 4th Ed., Sec. 303; Green v. Van Buskirk, 7 Wal., 139; Hervey v. R. I. Loco. Wks., 93 U. S. 664; Ingraham v. Geyer, 13 Mass. 146; Taylor v. Ins. Co., 14 Allen 353; Osborn v. Adams, 18 Pick. 245; Pierce v. O'Brien, 129 Mass. 314; Faulkner v. Hyman, 142 Mass. 53; People ex rel. Hoyt v. Com. Tax., 23 N. Y. 225; Edgerton v. Bush, 81 N. Y. 199; Ockerman v. Cross, 54 N. Y. 29; Hibernia Bank v. Lacombe, 84 N. Y. 367; Warner v. Jaffray, 96 N. Y. 248; Paine v. Lester, 44 Conn. 196; Upton v. Hubbard, 28 Conn. 273; Denny v. Faulkner, 22 Kans. 80; Lewis v. Bush., 30 Minn. 244; Jenks v. Ludden, 34 Minn. 482; Frazen v. Hutchinson, 62 N. W. (Ia.) (Minn. Statute) 698; Moore v.

Church, 70 Ia. 208; Sheldon v. Blanveld, 29 S. C. 453; Struker v. Tinkham, 35 Ga. 176; Mason v. Stricker, 37 Ga.262; Taylor v. Boardman, 25 Ga.593; Emerson v. Partridge, 27 Vt. 8; Martin v. Potter, 34 Vt. 87; Norris v. Mumford, 4 Mart. (La.) 20; Olivier v. Townes, 14 Mart. (La.) 93; Van Grytten v. Digby, 31 Beav. 561.

Nor will an assignment which depends for its force and validity upon the laws of another state, be recognized or enforced as against attaching creditors or bona fide purchasers.

Blake v. Williams, 6 Pick. 286; Taylor v. Columbia Ins. Co., 14 Allen 350; Osborn v. Adams, 18 Pick. 247; Ingraham v. Geyer, 13 Mass. 146; Pierce v. O'Brien, 129 Mass. 314; Frank v. Bobbitt, 155 Mass. 112; Story on Conflict of Laws (8th Ed.), Sec. 411; Burrill on Assignments (4th Ed.), Sec. 303; High on Receivers, 241; Harrison v. Sterry, 5 Cranch 289; Ogden v. Saunders, 12 Wheat. 213; Gilman v. Lockwood, 71 U. S. 409; Denney v. Bennett, 128 U. S. 438; Upton v. Hubbard, 28 Conn. 273; Paine v. Lester, 44 Conn. 196; Johnson v. Hunt, 23 Wend. 87; Abraham v. Plastoro, 3 Wend. 538; Willitts v. Waite, 25 N. Y. 587; Kelly v. Crapo, 45 N. Y. 86; Warner v. Jaffary, 96 N. Y. 248; Barth v. Backus, 140 N. Y. 230; Catlin v. Wilcox S. P. Co., 123 Ind. 477; McClure v. Campbell, 71 Wis. 350; Rhaum v. Pierce, 110 Ill. 359; Townsend v. Coxe, 151 Ill. 62 (37 N. E. R. 689); Milne v. Moreton, 6 Binney, 352; Manhattan Co. v. Steele Co., 31 Ohio L. J. 62; Moore v. Church. 70 Ia. 208; Franzen v. Hutchinson (Ia.), 62 N. W. 698; Dalton v. Currier, 40 N. H. 237; Hunt v. Ins. Co., 55 Me. 290; Ward v. Morrison, 25 Vt. 598; Weider v. Maddox, 66 Tex. 372; Walters v. Whitlock, 9 Fla. 86; Life Association v. Levy, 32 La. Ann. 1203.

And an assignment made under the laws of another state, which would be invalid if made in the state of Massachusetts, will not be enforced in that

state as against attaching creditors of the insolvent debtor, whether the assignment is prior or subsequent to the attachment. Zipcey v. Thompson, 1 Gray, 243; Fall River Iron Works v. Croade, 15 Pick. 11; Ingraham v. Geyer, 13 Mass. 146; Osborn v. Adams, 18 Pick. 245; Swan v. Crafts, 124 Mass. 453; Oldham v. Hallgarten, 135 Mass. 1; Faulkner v. Hyman, 142 Mass. 53, and cases there cited.

The assignment under consideration was made pursuant to Chapter 148 of the General Laws of Minnesota, for the year 1881, and the acts amendatory thereof, and is to be construed in view of the provisions of that act, which as far as important here are set out at length in an appendix to this brief.

The assignment was ineffectual as to attaching creditors in Massachusetts for several reasons:

1. There was no delivery of the property there situated;

2. There was no consideration for the assignment;

3. Its provisions were contrary to the settled policy and the express statutory enactments of that state.

4. It depends for its validity and force upon the statutory enactments of the state of Minnesota, which are derogatory of the Common Law, both of Massachusetts and of Minnesota.

The courts of Massachusetts have uniformly held since the decision of the case of Lanfear v. Sum-

ner, 17 Mass. 110 down to the present time, that a sale or transfer, in any form, of personal property, in order to be effectual as against bona fide purchasers or as against attaching creditors, must be accompanied by a change of possession, where the property sought to be transferred is capable of manual delivery. Property of great bulk not capable of delivery must in the nature of things be susceptible of constructive delivery without actual change of possession, and the same is true of certain other property, such as ships at sea and their cargoes. These exceptions are recognized by the courts of Massachusetts; but personal property, capable of delivery must be accompanied by actual and immediate change of possession, in order than the transfer may be effectual as to bona fide purchasers *or as to attaching creditors*. Lanfear v. Sumner, 17 Mass. 109; Hallgarten v. Oldham, 135 Mass. p. 1. The decision of the court in the case of Lanfear v. Sumner, has sometimes been criticized by American and English courts, but nevertheless it remains the law of Massachusetts, as shown by the subsequent decision in the case of Hallgarten v. Oldham, supra, decided in 1883, where this whole question was thoroughly considered.

In that case, the owner of certain personal property stored the same in a private warehouse in Massachusetts, and received from the keeper a receipt for the goods, by which it was promised, upon payment of the storage charges, to deliver to him his goods upon demand. The owner being indebted to a certain New York bank indorsed the ware-

house receipt in blank and delivered it to the bank as security for his indebtedness. This assignment and delivery of the warehouse receipt was supposed to be sufficient in New York under the decision of Wilkes v. Ferris, 5 John. 335; and Yenni v. McNamee, 45 N. Y. 614, to pass the title to the property to the bank. Subsequent to the transfer of the warehouse receipt a creditor brought suit in Massachusetts and attached the property, which was taken into the custody of the sheriff. The bank brought action against the sheriff for a recovery of the goods, claiming a prior title, as assignees of the warehouse receipt. At the time the attachment was made the goods were still in the hands of the warehouseman, and it was held by the trial court that the attaching creditor obtained a prior right to the property, by reason of the fact that there had been no delivery, and the plaintiffs appealed. Holmes, J., in delivering the opinion of the court, said:

"This case must be governed by the ordinary rule applicable to similar transactions taking place wholly within this state. When a sale, mortgage, or pledge of goods within the jurisdiction of a certain state is made elsewhere, it is not only competent, but reasonable, for the state which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction, in order to pass a title which it will recognize as against domestic creditors of the vendor of pledgor. This requirement is not peculiar to Massachusetts, but has the sanction of the highest courts of the United States and of other states." Citing numerous authorities.

"It is not necessary for the purposes of this case to consider whether it should be dealt with as an

exception to the general rule or as an illustration of sound and fundamental principle.

"We pass to the question whether enough has been done to give the plaintiffs a good title as against the defendant * * * as against attaching creditors, the law of Massachusetts has always required a delivery as well in the case of an absolute transfer, even a sale, as in that of a chattel mortgage or pledge, from the time of Lanfear v. Sumner, ubi supra, down to the latest volume of reports."

"*The delivery required by the rule in Lanfear v. Sumner, is delivery in its natural sense, that is, change of possession.*"

It was insisted that the bailee, upon a legal transfer of the property, became the agent or servant of the holder of the warehouse receipt, but the court held that his consent to hold for the purchaser must be shown and could not be presumed.

"It is obvious that a custodian cannot become the servant of another in respect of his custody, except by his own agreement. * * * When a private warehouse-man, who has an unfettered right to choose the persons for whom he will hold, gives a receipt containing only an undertaking to his bailor personally without the words 'or order' or any other form of offer or assent to hold for any one else, it is impossible to say that a mere indorsement over of that receipt will make him the bailee for a stranger. He has not consented to become so, * * * and until he has consented to hold for some one else, he remains the bailee of the party who entrusted him with the goods."

The bailor in that case had no notice of the transfer, but the inquiry was suggested in the case whether under the decisions of the Massachusetts court particularly in the case of Tucksworth v. Moore, 9 Pick. 347, if the bailee was notified of the

transfer of the property and continued to hold the same without objection his assent to hold for the purchaser would not be presumed, and such notice amount to a constructive delivery. But an examination of this and similar Massachusetts cases will show that the case is not applicable to the present case, for the conveyance was by absolute bill of sale, and the bailee had not only been advised of the transfer, but had been directed by both parties to the sale to hold the property for the purchaser, to which he tacitly assented, having no interest in the matter one way or the other. A similar condition existed in each of the Massachusetts cases there relied upon; and we think that in no case in Massachusetts, where the question was involved, has the court held that mere notice to a third party holding the property amounts to constructive delivery.

In the case at bar it is admitted by the stipulation of facts that the plaintiff in error never in fact acquired the actual custody or possession of the property, or any part thereof. And the only notice given to Mudge & Sons, which is as follows:— "I hereby notify you that for Security Trust Company, assignee, I take possession of the plates of the D. D. Merrill Company in your hands. George Earnest Merrill;"—was insufficient in itself to notify them of the fact, (if it were true) that the property in their hands had passed from the D. D. Merrill Company to the Security Trust Company. This being so, the notice did not require any assent or dissent on the part of Mudge & Sons. Furthermore, it nowhere appears that George E. Merrill

was an officer or agent of the D. D. Merrill Company, or of the Security Trust Company, or other than a mere stranger, when he assumed to act for the assignee. He did not assume to represent the D. D. Merrill Company, the bailor, and did not in fact take possession of the property. Nor did he obtain the consent of Mudge & Sons to hold the property as bailee for the assignee. Such consent, under the circumstances, certainly cannot be presumed. It does not appear what action, if any, was taken by them, but the fact that the D. D. Merrill Company was indebted to them in a considerable sum ($126.80, page 2 of the Certificate,) is sufficient to raise the presumption, if presumptions are to be indulged in, that they refused to recognize the title of the assignee to the property. It cannot be said that it made no difference to Mudge & Sons whether they held as bailees for the D. D. Merrill Company or for the assignee. It does not appear by the record that they had any lien upon the property for their indebtedness which would follow it and be collectable from the holder thereof, and if they released the property to the assignee, they would be required to send their claim to the state of Minnesota for collection and take their chances of recovery from the insolvent estate. In view of the well settled law of Massachusetts to the effect that its citizens will not be required to resort to other jurisdictions, when there is property of the debtor in Massachusetts applicable to the payment of the indebtedness, it cannot be presumed that Mudge & Sons consented to turn over this property

to the Security Trust Company or to hold it as its bailee. This indebtedness, as appears by the record and certificate, was never paid by plaintiff in error but remained due Mudge & Sons until on or about March 1, 1894, when it was assigned to the defendant in error and included in the indebtedness for the recovery of which the attachment suit was immediately brought. Fol. 3, p. 2, of the Certificate.

The courts of Massachusetts have repeatedly held that an assignment in trust for the benefit of creditors, whether statutory or common law, the only consideration for which is the acceptance of the trust by the assignee, is invalid against an attachment, except so far as assented to by creditors for whose benefit it was made. Such is the declared policy of the courts of that state. Edwards v. Mitchell, 1 Gray 239, Taylor v. Columbia Ins. Co., 14 Allen, 353; Ward v. Lamson, 6 Pick. 358; Russell v. Woodward, 10 Pick. 407; Fall River Iron Works v. Croade, 15 Pick. 11; Bradford v. Tappan, 11 Pick. 76; Ingraham v. Geyer, 13 Mass. 146; May v. Wannemacher, 111 Mass. 202; Pierce v. O'Brien, 129 Mass. 314; Falkner v. Hyman, 142 Mass. 53.

In the case of Ingraham v. Geyer, 13 Mass. 146, supra, the plaintiff had attached property in the state of Massachusetts belonging to a citizen of Pennsylvania, who had previously made an assignment there for the benefit of such of his creditors as should within four months from the date of the assignment, execute a full release of their demands

against the insolvent debtor, and providing that the proceeds of the estate should be distributed pro rata among such of his creditors as should execute such releases, and providing that the remainder, if any, should be paid over to the assignor. Parker, J., in his opinion, says:

"The question in this case is whether the assignment made by the debtor in Philadelphia is valid here, so as to defeat an attachment of the debt here under our trustee process. This assignment could not be supported if made within this state by parties residing or living here and with a view to being here executed. It is voluntary on the part of the debtor, and involuntary on the part of his creditors. It has no legal consideration; for the debts of those creditors who are to become parties are not discharged at the time, and it shuts out from a participation of the funds, all the creditors who will not give an absolute discharge of their debts. There is indeed, but one party to the indenture, namely, the assignor; for the persons named are his agents, until the creditors sign the instrument. Such an assignment could not be supported here."

The assignment was held to be void and ineffectual as to the rights of the attaching creditors.

In Pierce v. O'Brien, 129 Mass. 314, the insolvent debtor had made a voluntary assignment under the laws of the state of Rhode Island, of all his property both real and personal, to the plaintiff in trust for the benefit of his creditors. The assignment was concededly valid under the laws of Rhode Island. The plaintiff as assignee, took possession under the assignment, of certain personal property situated in the state of Massachusetts, but before the property was removed by the assignee from that com-

monwealth, it was attached by a creditor of the insolvent in the courts of Massachusetts. The assignee brought an action against the attaching creditor for the conversion of the property. It was held that the assignment was ineffectual to transfer to the assignee the title to the personal property of the insolvent debtor situated within the limits of that state. The court in its opinion said:

"The question is, how far our courts are bound to recognize assignments of this kind made in other states, as against our own citizens claiming to hold by attachment, property found in this commonwealth. The question is clearly settled by the decisions.

Independently of insolvent laws or assignments for the benefit of creditors authorized by statute, it has always been held by this court that voluntary assignments by a debtor in this commonwealth, in trust for the payment of debts, and without other adequate consideration, are invalid as against an attachment, except so far as assented to by the creditors for whose benefit they were made. Edwards v. Mitchell, 1 Gray 239; May v. Wannemacker, 111 Mass. 202. The assent of creditors is not presumed, but must be shown by some affirmative act, such as presenting claims or becoming parties to the written assignment. Russell v. Woodward, 10 Pick. 407. *Such assignments made by judicial or legislative authority in another state are not held binding here.* Taylor v. Columbia Ins. Co., 14 Allen, 353. *And an assignment made by the debtor in another state, which if made here would be set aside for want of consideration, will not be sustained against an attachment by a Massachusetts creditor although valid in the place where it is made. There is no comity which requires us to give force to laws of another state, which directly conflict with the laws of our own, or to allow the act of a debtor, resident of another state, an effect*

in disposing of his property, as against his creditors here, which it would not have if he had lived in Massachusetts."

Citing Zipcey v. Thompson, 1 Gray 243; Swan v. Crafts, 124 Mass. 453; Osborn v. Adams, 18 Pick. 245.

In an earlier Massachusetts case it was said:

"Assignments by insolvent debtors in trust to pay their debts, either in a specified order or pro rata, are not deemed of sufficient validity to protect the assigned property from the attachments of the creditors of the assignor. There is no adequate consideration, and without this, no insolvent debtor can so dispose of his property as to place it beyond the reach of his creditors. The validity of such assignments must depend upon the assent of the creditors. Nothing being paid by the assignees, the consideration, as to them, must consist in their covenants to execute the trusts. The creditors are not obliged to become parties to them. Nor is their assent to their provisions to be presumed. They may prefer to resort to attachments. The option is to be exercised by them and to be evidenced by some overt act on their part. If they decline or omit to join in the assignment, there are no cestui que trusts, and so no trust to be executed, and the consideration entirely fails."

Fall River Iron Co. v. Croade, 15 Pick. 11.

In the case of Faulkner v. Hyman, 142 Mass. 53, the plaintiff attached as property of the principal defendants, certain debts due them from persons in Massachusetts named in the writ as trustees. Prior to the attachments, the defendants had made an assignment for the benefit of their creditors, under the laws of the state of New York, of all their property wherever situated, and it was conceded

that this assignment was in all respects valid by the laws of the state of New York. The assignee intervened in the attachment suit in Massachusetts, claiming title to the funds in the hands of the garnishees. It was held that the assignment was ineffectual to transfer the title to the property situated in the state of Massachusetts as against the claims of the attaching creditors. The court in its opinion says:

"This assignment was not executed or assented to by any of the creditors named therein, or any other creditors of the principal defendants for whose benefit it purports to have been executed. It has repeatedly been held in this commonwealth, and by a long series of decisions that a voluntary assignment in trust for the benefit of creditors, the only consideration for which is the acceptance of the trust by the assignee, is invalid against an attachment, except so far as assented to by creditors, in which case, being good at common law, it will protect the property from attachment to the extent of the amount due the creditors thus assenting. This, for the reason that there is no adequate consideration, unless with the assent of creditors, without which no insolvent debtor should be allowed so to dispose of his property as to place it beyond their reach. It has further been held that such assent is not to be presumed, but must be shown by some affirmative act, such as presenting claims, accepting a dividend, or distinctly becoming a party to the written assignment. May v. Wannemacher, 111 Mass. 202; Swan v. Crafts, 124 Mass. 453; Pierce v. O'Brien, 129 Mass. 314."

"The assent of creditors is not presumed, but must be shown by some affirmative act, such as presenting claims, or becoming parties to the written assignment." Pierce v. O'Brien, 129 Mass. 314; Russell v. Woodward, 10 Pick. 407; Swan v. Crafts, 124

Mass. 453; Fall River Iron Works v. Croade, 15 Pick. 11; Falkner v. Hyman, 142 Mass. 53.

And as to creditors who have not assented to the assignment prior to an attachment, the rights of the attaching creditor are superior.

Bradford v. Tappan, 11 Pick. 76.

Pierce v. O'Brien, 129 Mass. 315.

And any surplus in the hands of the assignee, beyond the amount of the aggregate claims of creditors who had assented, would be liable to attachment. Bradford v. Tappan, 11 Pick. 76; Widgery v. Haskell, 5 Mass. 144; Borden v. Sumner, 4 Pick. 265; Pierce v. O'Brien, 129 Mass. 314, 315; Falkner v. Hyman, 142 Mass. 53.

Plaintiff in error has not seen fit, either by appropriate proceeding in Massachusetts, or in the case at bar, to show either that the claims of creditors, in an amount sufficient to absorb the funds in its hands, had been filed prior to the attachment, or that after paying the claims of all creditors other than the defendants in error, there does not remain in its hands, or has not been returned to the assignor, under the provisions of the assignment, a surplus derived from the estate. It is true that the deed of assignment recites that the D. D. Merrill Company, at the time of the assignment was made, was insolvent, but it has been held by the courts of the state of Minnesota, that a debtor is insolvent, within the meaning of the insolvency act, when he is unable, in the ordinary course of business, to meet his obligations as they become due, and it does not necessarily follow therefore that the estate might

not eventually more than pay its entire indebtedness. It was important to plaintiff's right to the property attached in Massachusetts, that these facts, if true, should have been shown to the court of Massachusetts. That was the place for it to assert its rights to the property.

Cunningham v. Butler, 142 Mass. 49-51.

Green v. Van Buskirk, 7 Wall. 139.

Cole v. Cunningham, 133 U. S. 107.

Moore v. Railroad Co., 43 Ia. 385.

Williamson v. Kas. & Texas Coal Co. (Kas.), 50 Pac. Rep. 106, and cases cited.

Section 10, Chapter 184, Pub. Stats. of Massachusetts, provide that,

"When goods of a value greater than $20.00 are unlawfully taken or detained from the owner or person entitled to the possession thereof, or when goods of that value which have been attached on mesne process, or taken on execution, are claimed by a person other than the defendant in the suit in which they are so attached or taken, such owner or other person may cause such goods to be replevined."

This certainly would have afforded one convenient method of determining the title to the property in suit, if plaintiff had chosen to avail itself of it.

There is no showing here that the assignment in question was ever assented to by any of the creditors of the Merrill Company, either before or after the attachment by these defendants of the property in question, and the court cannot presume such assent in the absence of proof thereof.

The contention of the plaintiff in error that the question of its right to show the assent of creditors

before the attachment was made is one of the issues before the Circuit Court of Appeals, has no foundation in fact. The point has never before been raised. A certified copy of the proceedings in the Court of Appeals was before this court a few days since, on motion to bring up the whole record, and the court will remember that no such question was there involved or suggested, and if it had been it certainly is not now before this court.

The act under which the assignment was made, provides that creditors shall file their claims against the estate within thirty days, and that no creditor shall receive any benefits under the assignment, or share of the proceeds of the debtor's estate without having first filed with the clerk of the court a release to the debtor of all claims, except the dividends to be paid under the provision of the statute, and provides that any surplus remaining in the hands of the assignee shall be returned to the assignor. The deed of assignment itself contains all these provisions.

Under this act the debtor may dispose of his entire property in the payment of the indebtedness to a single creditor, in opposition to the express wishes of the remainder, no matter how numerous, unless they come in, file their claims and releases and take their chances on what they will receive from the insolvent estate. Creditors who are unwilling to do this, must stand by and see the entire estate of the debtor appropriated to the payment of the claims of other creditors, to the exclusion of their

own, and they are not even allowed the surplus remaining after payment of the claims of the creditors who have assented. An assignment of this character has been held by the Supreme Court of Minnesota in the case of May v. Walker, 35 Minn. 194, to be absolutely void at common law, as to creditors who have not consented to it, and not merely ineffectual for the purpose of compelling creditors to release their claims against the debtor, as is claimed by the plaintiff in error (page 16 of plaintiff's brief).

The court says:

"Though there is some conflict of opinion, every consideration of honesty and good sense supports the proposition that an assignment by an insolvent debtor of his property, providing, as in the present case, that the proceeds shall be applied towards the payment of his indebtedness to such of his creditors only as shall release their claims against him, is, in the absence of express statute to the contrary, as by a bankrupt law, or something in the nature of one, fraudulent and invalid; and this, for the reason that it is the duty of an insolvent debtor to apply his property to the payment of his debts as far as it will go, without conditions and without coercing his creditors to surrender any part of their just claims against him as the price of receiving their just share of his estate."

"At common law the assignment in this case is bad again, because, while providing for the payment of such creditors only as shall release their claims, it still further provides for the payment of any surplus to the assignor. The effect is to put that surplus out of the reach of non-releasing creditors like plaintiff, and to create a trust for the benefit of the assignor, to the hindering and delaying of such creditors in the collection of their demands. Truitt v. Cadwell, 3 Minn. 257 (364) (74 Am. Dec. 764); Banning v. Sibley, 3 Minn. 282 (389); 2 Kent, Comm. 534."

"As respects a creditor like the plaintiff, who will have nothing to do with it, the assignment is void; and he may therefore disregard it, and lay hold of the assigned property or its proceeds in the hands of the assignee, by garnishment or otherwise, as the circumstances advise. National Park Bank v. Lanahan, 60 Md. 477; Edwards v. Mitchell, 1 Gray, 239. The assignment, being fraudulent and void as to him, does not have the effect, so far as he is concerned, to place the property purporting to be assigned, or its proceeds, in *custodia legis*, for, as to him, the jurisdictional foundation of an assignment under and in accordance with the insolvent act is wanting."

To the same effect is Edwards v. Mitchell, 1 Gray, 239, where the same question is presented, in a similar case. The court there said:

"But independent of those statutes, an assignment of property to trustees for the benefit of creditors, to which the creditors are not parties, would be void against creditors, by the common law of Massachusetts, as it was understood and administered, before the first of these statutes was passed."

The same rule is laid down in Ingraham v. Geyer, 13 Mass. 146, where an assignment had been made in Pennsylvania for the benefit of all of the creditors of the debtor who should within four months after the assignment file a release of their claims. The assignment was concededly valid in Pennsylvania, but the court of Massachusetts refused to recognize the title of the assignee as against attaching creditors in that state, although the trustee in whose hands the property was had been duly notified of the assignment.

The syllabus reads:

"An assignment of all his effects, by an insolvent debtor in Pennsylvania, in trust for such of his creditors as should within four months release all their demands against him, the surplus to be distributed, pro rata, among his other creditors, and the remainder, if any, to be paid over to the assignor, was holden to be void as against a creditor here, who, after such assignment, and after notice thereof to a debtor here, summoned such debtor as the trustee of the insolvent."

And in the opinion, Chief Justice Parker said:

"This assignment could not be supported, if made within this state by parties residing or living here, and with a view to be here executed. It is voluntary on the part of the debtor, and involuntary on the part of the creditor."

See also Bennett v. Ellison, 23 Minn. 243; Grover v. Wakeman, 11 Wend. 187; Burrill on Assignments, Sec. 195; Barth v. Backus, 40 N. Y. 230.

Under the provisions of the insolvency act of Massachusetts, the assignee or receiver of an insolvent debtor is appointed by the creditors themselves, who control to a large extent the whole insolvency proceeding and the assent of a majority must in every case be had before the debtor can be discharged, unless his estate pays fifty per cent of his indebtedness. Chapter 157, Pub. Statutes of Mass. 1882.

Assuming for the present that the assignment under consideration is in its nature voluntary, it is apparent from a comparison of these assignment laws and from an examination of the decisions of the courts of Massachusetts, that the assignment would not be held effectual by the courts of that state to transfer to the assignee the title

to the personal property in controversy, as against attaching creditors who are citizens of Massachusetts. This, in fact is virtually admitted by the plaintiff in error, but it is insisted that the defendants in error, being citizens of New York, do not stand in the same position as would citizens of Massachusetts under like circumstances.

We are not unmindful of the fact that the Supreme Court of Massachusetts has attempted in the case of voluntary assignments to make a distinction between the rights of attaching creditors who are citizens of that state and those creditors who are citizens of another state (Frank v. Bobbett, 155 Mass., and cases cited); but with all due respect to that able court, we submit that it is not competent for the courts of one state of the union to refuse to citizens of a sister state, who are rightfully before the court, the same rights and privileges as are afforded to its own citizens.

"In the absence of any statutory provision to the contrary, non-residents as well as residents may avail themselves of the proceeding by attachment."

Drake on Attachments, (6th Ed.) 11. Citing McClerkin v. Sutton, 29 Ind. 407; Mitchell v. Shook, 72 Ill. 492; Tryson v. Lansing, 10 La. 444; Posey v. Buckner; 3 Mo. 413; Gray v. Briscoe, 6 Bush. 687.

Some courts even go further and hold that by virtue of Section 2, Article 4 of the United States Constitution, one of the United States cannot provide attachment laws for its citizens which will not be available to the citizens of every other state. Ward v. McKenzie, 33 Tex. 297 (hereafter quoted at

length); but the legislature of Massachusetts has not attempted to do this. Sec. 38, Chap. 161, Pub. Stat. Massachusetts, 1882, provides that:

"'All real and personal estate liable to be taken on execution (except such personal estate as from its nature or situation has been considered exempt according to the principles of the Common Law, etc.) may be attached upon the original writ in any action in which debt or damages are recoverable and may be held as security to satisfy such judgment as the plaintiff may recover."

This provision is general and applies to all suitors, whether citizens or non-residents.

This being so, the court of Massachusetts, in passing upon the conflicting claims of attaching creditors and assignees claiming under foreign assignments, must apply the same rule in determining the rights of non-resident creditors, pursuing their remedies by attachment in the usual course of procedure in the courts of that state, which it would apply were such creditors citizens of Massachusetts. This is a constitutional right secured to every citizen of the United States. Slaughterhouse Cases, 16 Wall.36; Greene v. Van Buskirk, 5 Wall. 307; 7 Wall. 139; Barth v. Backus, 140 N. Y. 230; Lemmon v. People, 20 N. Y. 608; Hibernia Bank v. Lacombe, 84 N. Y. 567; Warner v. Jaffray, 96 N. Y. 248; Ward v. Morrison, 25 Vt. 598; Morton v. Potter, 34 Vt. 87; Rice v. Coates, 32 Vt. 460; Paine v. Lester, 44 Conn. 196; Upton v. Hubbard, 28 Conn. 275; Newland v. Reily, 85 Mich. 151; Kidder v. Tufts, 48 N. H. 121; Sturtevant v. Armsby Co., 23 Atl. R. (N. H.) 368; Ward v. McKenzie, 33 Tex. 297; Cofrode v. Gart-

ner, 79 Mich. 332; Rhaum v. Pearce, 110 Ill. 350; Philson v. Barnes, 50 Pa. St., 230; Morgan v. Neville, 74 Pa. St. 52; Lewis v. Bush., 30 Minn. 244; Jenks v. Ludden, 34 Minn. 482; Lovering v. Paine, 10 Ia. 282; Sheldon v. Blanvelt, 29 S. C. 452; Catlin v. Wilcox, S. P. Co., 123 Ind. 477. See also Ward v. Maryland, 12 Wallace, 163; Paul v. Virginia, 8 Wallace, 177; Ex parte Virginia, 100 U. S. 339; Missouri v. Lewis, 101 U. S. 22; Barbier v. Connolly, 113 U. S. 31.

It is undoubtedly true that the case at bar must be determined according to the law of the state of Massachusetts, by reason of the constitutional provision that

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Art. 4, Sec. 1, U. S. Constitution. And by virtue of the act of congress of 1790, (1 U. S. Stat. 122) which provides that such acts, records and judicial proceedings, when duly authenticated, shall be given the same effect in every other state as they have by the laws of the state from which they are taken.

Greene v. Van Buskirk, 5 Wall 17; 7 Wall. 139.

But this does not require this court to follow the decisions of the court of Massachusetts, which violate the provisions of the United States constitution, which provide that

"The citizens of each state shall be entitled to all the provileges and immunities of the citizens of the several states."

Sec. 2, Art. 4, U. S. Constitution.

And that "No state shall deny to any person within its jurisdiction equal protection of the laws." Sec. 1, of 14th Amndt., U. S. Constitution.

And it is respectfully submitted that if plaintiff in error, claiming title to the property in controversy under this assignment, had intervened in the attachment proceeding brought by the defendants against the Merrill Company in the state of Massachusetts, or taken other appropriate proceedings there to test the title to the property, or had brought an action in the courts of that state against the sheriff of Suffolk county, or against these defendants for damages for the conversion of this property, which would have brought up the same controversy which is pending here, and the courts of Massachusetts should declare that while the assignment in question was invalid and ineffectual for the purposes of transferring to the assignee, the title to the property in question, as against attaching creditors who were citizens of that state, and yet have held it valid and effectual as against the defendants as attching creditors, citizens of the state of New York, such ruling would be erroneous, and the defendants would be entitled to have the judgment of the Massachusetts court reversed, upon appeal to this court, because in violation of Sec. 2, Art. 4 of the United States Constitution, which provides, "that the citizens of each state shall be entitled to all the rights, privileges and immunities of citizens in the several states," and in violation of Section 1 of the fourteenth amendment

which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

Under these provisions of the Constitution the courts of Massachusetts cannot apply one rule of law in behalf of the citizens of its state, and another in behalf of sitizens of another state; solely upon the ground of citizenship.

With the exception of Massachusetts courts the various courts of the Union, except in a few cases in which the question does not appear to have been called to the attention of the court, have given full effect to this constitutional provision.

In Greene v. Van Buskirk, 7 Wallace 139, supra, the court, in speaking of the case of Guillander v. Howe, 35 N. Y. 657, said:

"That case and the one at bar are alike in all respects, except that the attaching creditor there was a citizen of the state in which he applied for the benefit of the attachment laws, while Greene, the plaintiff in error, was a citizen of New York, and it is insisted that this point of difference is a material element to be considered by the court in determining this controversy, for the reason that the parties to this suit, as citizens of New York, were bound by its laws, being citizens thereof. But the right under the constitution of the United States, and the laws of congress, which defendant invokes to his aid, is not at all affected by the question of citizenship. We cannot see why, if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other states equal privileges with her own, in her foreign attachment laws, that the judgment against the personal estate located within her limits of a nonresident debtor, which a citizen of New York lawfully obtained there, should have a different

effect given to it under the provisions of the constitution and the law of congress, because the debtor against whose property it was recovered, happened also to be a citizen of New York."

And in the "Slaughter House Cases" (16 Wall. 36), subsequently decided by this court, this same doctrine is laid down in the most positive terms. Mr. ustice Miller, in delivering the opinion of the court, in treating of this provision of the constitution, said:

"In the case of Paul v. Virginia, 8 Wall. 180, the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities, which are common to the citizens in the latter states under their Constitution and laws by virtue of their being citizens.' (And adds) "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

"Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In Ward v. McKenzie, 33 Texas, 314, it is said:

"It may be assumed that whatever privilege, benefit or advantage, a resident citizen may derive from the provisional remedy of attachment, which has been created by the attachment law of this state, is equally accessible and available to any citizen of

any of the United States, because the constitution of the United States has declared, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' All the civil rights and obligations conferred or imposed by the laws of a state, upon its own citizens may be enjoyed and must be submitted to by the citizens of other states, whenever the action of a state tribunal is invoked for their adjustment, or enforcement. It is not a matter of mere comity among states, but it is a constitutional guaranty.

"Whatever of right, then, exists in a resident to proceed by attachment upon such a state of facts as is presented by this record, exists, also, in any citizen of the United States who may seek the interposition of the courts here to enforce his just or equitable demands: If, therefore, a resident citizen, who holds a just claim against a non-resident or absent debtor, can proceed by attachment against such non-resident or absent debtor, whatever be the character of the claim, provided it be a just one; so may a non-resident creditor proceed in the same way, when he shall have complied with the requisitions of the attachment laws."

In Hibernia Bank v. Lacombe, 84 N. Y. 567, supra, Danforth, J., in delivering the opinion of the court, said:

"Once properly in court and accepted as a suitor, neither the law nor the court administering the law, will admit any distinction between a citizen of its own state and that of another. Before the law and in its tribunals, there can be no preferences of one over the other."

In Lemmon v. People, 20 N. Y. 608, supra, the court, in commenting upon the rights secured to citizens of the different states, under these provisions of the constitution, said:

"That the language is that they shall have the same privileges and immunities of citizens in the

several states. In my opinion the meaning is, that in a given state, every citizen of every other state shall have the same privileges and immunities—that is, the same rights—which the citizens of that state possess. In the first place they should not be subjected to any of the disabilities of alienage; they can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation, which should place them in a worse situation than a proper citizen of a particular state would be unlawful."

In Warner v. Jaffray, 96 N. Y. 248, the court said:

"A foreign creditor has the same rights here against the property of his nonresident debtor, as a resident creditor has."

The New York cases upon this subject were reviewed and discussed in the recent case of Barth v. Backus, 140 N. Y. 230, decided in 1893, and the rule announced in Lemmon v. People, Hibernia Bank v. Lacombe, and Warner v. Jaffray, was reaffirmed. The court said:

"These decisions must be regarded as establishing the law of the state on the subject. And the court added:

"The courts of this state accord to our citizens the same liberty to proceed in another jurisdiction in hostility to assignments executed here, which they accord to citizens of another state coming here and instituting proceedings in hostility to transfers in insolvency, valid by the laws of their domicile."

In Paine v. Lester, 44 Conn. 196, it was said:

"In this case the plaintiff is a citizen of Rhode Island, but the fact does not affect the case. The citizens of all our sister states have, by the constitution of the United States, the same privileges with our citizens, and any one of them who has availed himself of the legal remedies furnished by

our laws to secure payment of the debt due him, has the same claim to the assistance of our courts that one of our own citizens would have."

In Kidder v. Tufts, 48 N. H. 121, the court refused to discriminate in favor of a New Hampshire creditor against a citizen of the state of Massachusetts, both creditors claiming title in hostility to an assignment executed under the laws of Massachusetts. The court said:

"The plaintiffs have availed themselves of their strict legal rights as established and allowed by our statute law, and a practice which has existed for at least a century. For the purpose of making an attachment on property of the defendant here, the plaintiffs may properly be considered subjects of our state government, so long as they submit to our jurisdiction and claim the protection of our laws; and we do no more in allowing them the advantage of their superior diligence than to admit them to the full enjoyment of that privilege so clearly expressed in the constitution of the United States, that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

In Rhaum v. Pearce, 110 Ill. 350, the court citing and commenting upon the decision and the language of the court in Hibernia Bank v. Lacombe, 84 N. Y. 567, said:

"We regard this as the correct doctrine. Under our laws, the courts of this state are open alike to citizens of every state for the enforcement of legal rights, and when a nonresident invokes the aid of our courts to enforce this legal right, interstate comity does not demand that our courts shall give the laws of another state extra-territorial effect here, and to adopt those laws in the administration of justice." (Citing Paine v. Lester, 44 Conn. 196 and Kidder v. Tufts, 48 N. H. 121) "Indeed, we

have the constitutional guaranty that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. Greene v. Van Buskirk, 7 Wallace 139."

In Jenks v. Ludden, 34 Minn. 482, Mitchell, Judge, says:

"Notwithstanding that a contrary doctrine, narrow and provincial, as we think, and of questionable constitutionality, has heretofore some times obtained, yet we think we may lay it down as reasonably well settled that when once in court and accepted as a suitor, neither the law nor the court administering it will make any distinction between citizens of their own state and those of another, but that a citizen of one state, rightfully in court pursuing a remedy given by the laws of our state, may enforce that remedy to the same extent, and with the same superiority of lien as a citizen of the former."

In Ward v. Morrison, 25 Vt. 598, the defendant had made an assignment in New York for the benefit of his creditors, the plaintiff also a citizen of New York, brought suit in Vermont and attached funds of the debtor there situated in the hands of a garnishee. The assignee appeared and claimed a right to the funds by virtue of a foreign assignment. It was contended that the plaintiff being a citizen of New York, where the assignment was made, was subject to the laws of that state, and could not lawfully prosecute his attachment in defiance of the assignment. The court, in its opinion on this branch of the case, said:

"We have no doubt that this debt is subject to our trustee process at the suit of the plaintiff, though a citizen of the state of New York. By the United States constitution the citizens of each state are entitled to all the privileges and immunities of citizens

in the several states, and if we deny to the plaintiffs the use of our courts to enforce their legal rights, whether against our own citizens or others, as fully as they may be used by the citizens of Vermont, for that purpose, there might be ground to complain of a refraction of this provision in the constitution."

In Paul v. Virginia, 8 Wallace, 177, Mr. Justice Field, in speaking of this provision of the constitution, said:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alieage in other states. It inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisation and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the constitution has tended so strongly to constitute the citizens of the United States one people as this."

In the case of Sturtevant v. Armsby Co., 23 Atl. R. 368, decided by the Supreme Court of New Hampshire in 1891, it appeared that one Hanson had made an assignment under the laws of the state of Massachusetts to the plaintiff, Sturtevant, who was also a citizen of that state. The defendant, citizens of Illinois, afterwards brought suit in New Hampshire against Hanson and attached certain property of his found in the state of New Hampshire. Sturtevant filed a bill in equity in the New Hampshire courts to enjoin the prosecution of this action, in-

sisting that as against a subsequent attaching creditor, not a citizen of the state of New Hampshire, the assignment was effectual to transfer to the assignee the title to the property in question. The court said:

"An assignment under the insolvent law of another state is not permitted to prevail against a subsequent attachment by a citizen of this state, of the insolvents' property found here." "But as against subsequent attaching creditors who are citizens of a foreign country, the assignment prevails. Sanderson v. Bradford, 10 N. H. 260. The defendants are not foreigners; they are citizens of Illinois, and as such, when in this jurisdiction, are entitled under the fourteenth amendment of the Federal Constitution, to the equal protection of our laws, (citing cases). They are now in this jurisdiction. They are here lawfully in court as suitors, and in that character entitled to all the rights the law gives to our own citizens. The amendment means that no person or class of persons shall be denied the same protection of the laws, which is enjoyed by other persons or other classes in the same place, under like circumstances." Citing Missouri v. Lewis, 101 U. S. 22, Exparte Virginia 100 U. S. 339, Barbier v. Connolly, 113 U. S. 31, Soon Hing v. Crowley, 113 U. S. 703, Yick Wo v. Hopkins, 118 U. S. 356, Hayes v. Missouri, 120 U. S. 68; Railway Co. v. Beckwith, 129 U. S. 26; Railway Co. v. Pennsylvania, 134 U. S. 232; Railway Co. v. Minnesota, 134 U. S. 418, Paine v. Lester, 41 Conn. 196, Bank v. Lacombe, 84 N. Y. 367.

It has been repeatedly held both by the Federal and State courts, including the State of Massachusetts, that under Section 2, Article 4 of the Constitution, above quoted, the courts of each state are open to citizens of every other state the same as to their own citizens. This is expressly held in the

case of Barrell v. Benjamin, 15 Mass. 354. In that case the plaintiff was a citizen of Connecticut, the defendant was a foreigner, and the point was made that the court had no jurisdiction of the action. The court said:

"The plaintiff is a citizen of the United States having his domicil in Connecticut. By the second section of the fourth Article of the Constitution of the United States, that 'the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states,' since the adoption of the constitution, the citizens of Connecticut or any other state of the Union cannot be considered as foreigners, and indeed are not so considered practically, in any of the courts of law. It will be admitted that a citizen of Massachusetts has the privilege to sue any foreigner who may come within this state. If so, a citizen of Connecticut has the same privilege secured to him by the Constitution. An argument which might be plausable if used against a foreigner cannot prevail against the defendant, who has none of the disabilities of a foreigner attending him."

But of what advantage would this constitutional privilege of a citizen of one state to bring a suit in another jurisdiction be, if the court where such suit was brought should be at liberty to and actually insist on applying to him a different rule of law to that applied to its own citizens.

This same question was asked in the case of Suidam v. Broadnax, 14 Peters 67, in which it was insisted that by virtue of a statute of Alabama exempting administrators from suit, that such administrator could not be sued in the Circuit Court of the United States by a resident of another state, notwithstanding the provision of Article 3, Section

2 of the Constitution of the United States, which gives the Circuit Court of the United States original cognizance concurrent with the courts of the several states, of certain classes of cases, among which are cases in which "the suit is between a citizen of a state where the suit is brought and a citizen of another state," etc. The court, by Justice Wayne, said:

"It was certainly intended to give to suitors having a right to sue in the Circuit Court, remedies coextensive with these rights. These remedies would not be so if any proceeding under an act of the state legislature to which plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court.

If it be conceded that a voluntary assignment for the benefit of creditors, valid in the state where made, is effectual to pass to the assignee thereunder the title to personal property of the assignor situated in another state, yet the assignment under consideration can have no such effect for the reason, if for no other, that it was made under and pursuant to the provisions of an act of the legislature of the state of Minnesota, which is not merely declaratory of the common law, as is the Minnesota assignment act of 1887, but which in effect is a bankruptcy act. An assignment made pursuant to the provisions of this act (Chap. 148, Laws of 1881, as amended by the law of 1885 and 1889, now Chap. 41, Gen. Stats. of 1894, Title 5), is compulsory in its nature and cannot be said to be a voluntary assignment in the sense in which the term is used by the courts in speaking of voluntary assignments, which being valid where made may be inforced in another state.

Section 1 of the act provides, in substance, that when a debtor shall have become insolvent, or when his property shall have been levied upon by virtue of an attachment, execution, or legal process issued against him for the collection of money, or garnishment shall have been made against him, he may make an assignment of all his unexempt property for the equal benefit of all his creditors, who shall file releases of their demands against him, as therein provided, and such assignment, if made within ten days after a garnishment shall have been made or within ten days after his property shall have been levied upon, under legal process against him for the collection of money, shall operate to vacate every such garnishment and levy then pending, and to discharge all property from such levy or garnishment.

Section 2 of the act provides, that if any insolvent debtor shall confess judgment, or do any act whereby any of his creditors, shall obtain preference over any other of his creditors, or shall omit to do anything which he might lawfully do to prevent any of his creditors from obtaining preference over any of the other of his creditors, or shall not make an assignment under the first section of the act within ten days after garnishment made against him, or within ten days after levy made on any of his property, then any one or more of his creditors having claims against him to the aggregate amount of at least two hundred dollars, may petition the District Court or a judge thereof, asking for the appointment of a receiver of the unexempt property of such debt-

or, and if it shall appear that such insolvent debtor has omitted to do anything which he might have lawfully done to prevent any of his creditors from obtaining preference, or that he has not made an assignment under the first section, after garnishment made or process levied on his property, then the court shall appoint a receiver to take possession of all the property of such debtor, and distribute the net proceeds thereof ratably and in proportion to the amount of their several demands, among the creditors of such debtor, who shall come in and make due proof of their respective claims and demands within such time and in such manner as the court shall direct, and who shall in consideration of the benefits of the provisions of the act, execute and file releases of their respective demands against such debtor, except to the extent that they shall receive payment thereof from the proceeds of such estate.

Section 3 provides that "if any insolvent debtor shall confess or suffer judgment to be procured in any court with intent that any one of his creditors shall obtain a preference over any other of his creditors, such insolvent debtor shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding five hundred dollars ($500), and in default of payment shall be imprisoned in the county jail for a period not exceeding six months."

The Supreme Court of Minnesota construing this statute holds that when a debtor, who is insolvent, is sued upon a claim as to which he has no bona fide defense, it is his duty, under the statute, to prevent a preference by making an assignment before the

proceedings for the collection of the debt have reached the stage where he cannot prevent the preference.

"If he willfully fails to perform his duty, it must be held that he intended the consequences of his own unlawful omission, that he intended to permit such creditor to take a preference, that he intended such creditor should have a preference. The judgment lien so obtained is a 'security given' by means of an intentional failure on his part to perform his duty. Clearly a preference so obtained by his unlawful act must be held to be an unlawful preference on the part of the insolvent debtor. The case of Wilson v. City Bank, 17 Wall. 473, is not in point. There is a material difference between the language of the bankruptcy act and our insolvent law. As construed by the court in that case, the bankruptcy act does not impose upon the insolvent debtor the duty of preventing preferences among his creditors, it goes no further than to prohibit him from actively participating in the procurement to the creditor of such a preference. It permits him to remain passive while the creditor is, by process of law, obtaining a preference; our statute does not."

Yanish v. Pioneer Fuel Co., 60 Minn. 321.

The act further provides that the court may for any proper cause remove the assignee and appoint another in his stead, and shall do so upon the petition of a majority in number and amount of the creditors of such insolvent debtor, and shall thereupon appoint the person specified in the petition of such creditors, if the court believes him to be a proper person, as assignee or receiver of said insolvent's estate. All attachments and levies previously made upon the debtor's property, with a single exception not important here, are dissolved upon the appointment and qualification of an assignee or

receiver, and all proceedings under the act are had under the direction of the District Court or a judge thereof, who is vested with large discretionary powers in the matter of practice.

Wendel v. Lebon, 30 Minn. 234.

Upon the perfecting of the assignment, and to some extent at least, upon the simple execution of it by the assignor, its entire subject matter and everything involved in it, including the assigned property, come under the jurisdiction of the District Court ipso facto, and without the institution of any suit or proceedings, and by consequence, the assigned property is then in custodia legis.

In re Mann, 32 Minn. 412.

The Supreme Court of Minnesota has had occasion in a number of cases to construe this statute, and has repeatedly held that upon the execution and filing of an assignment, or the appointment of a receiver under its provisions, the property is in custodia legis and that the act itself is, in its essential features, a bankrupt act. Wendel v. Lebon, 30 Minn. 234; In re Mann, 32 Minn. 60; Lord v. Meacham, 32 Minn. 66; Simon v. Mann, 33 Minn. 412; Bennett v. Denny, 33 Minn. 530; Jenks v. Ludden, 34 Minn. 482; Daniels v. Palmer, 35 Minn. 347.

In Jenks v. Ludden, supra, the court, in discussing the question as to what, if any, force or effect should be given to an assignment made under the provisions of this act, by the courts of another state, says: "Our insolvent law and the statute of Wisconsin regarding asignments for the benefit of cred-

itors are essentially different. Our act of 1881 is, as we have repeatedly held, a bankrupt act, the assignee being in effect an officer of the court, and the assigned property being in custodia legis to be administered by the court or under its direction."

Again, in the case of Daniels v. Palmer, supra, the court, in discussing the meaning of the term "insolvency" as used in the act of 1881, says:

"That our statute is a bankrupt law has been repeatedly held by this court. Wendell v. Lebon, 30 Minn. 244; In re Mann, 32 Minn. 60; Simon v. Mann, 33 Minn. 412; Jenks v. Ludden, 34 Minn. 482. And when the legislature, in such an act, employed terms which had acquired a certain and well understood meaning as used in the various bankrupt acts of both England and the United States, it is to be presumed that they used them in the same sense." The construction placed upon this act by the Supreme Court of Minnesota in these cases is abundantly sustained by the decisions of the courts of other states, construing this and other statutes containing similar provisions, Barth v. Backus, 140 N. Y. 230; McClure v. Campbell, 71 Wis. 350; Holton v. Burton, 78 Wis. 321; Hempsted v. Bank, 78 Wis. 375; Boese v. King, 78 N. Y. 471; Franzen v. Hutchinson (Ia.), 62 N. W. 698; Weider v. Maddox, 66 Tex. 372 (1 S. W. 168).

In the case of Barth v. Backus, decided by the New York Court of Appeals in November, 1893, the assignee of a Wisconsin corporation, under an assignment for the benefit of creditors made in that state, sought to recover possession of certain of the assets of the insolvent corporation situated within

the state of New York, and which had been attached, subsequent to the assignment, by the defendants to secure their claims against the insolvent debtor. It appeared that the indebtedness on which the attachment suit was based was originally owing to a Wisconsin creditor, who had subsequent to the assignment, transferred the claim to the attaching creditor, who was a citizen of the state of New York. The insolvency law of Wisconsin, pursuant to which the assignment was made, as amended in 1889, contains provisions substantially the same as our act of 1881. Andrews, Chief J., in discussing the effect to be given to this Wisconsin assignment, said:

"The general question in this case, involves the point whether the assignment made by the Wilcox Manufacturing Co. under the statute of Wisconsin is to be treated as a voluntary assignment not in conflict with our laws or policy, or whether, in view of the compulsory clauses of that statute, it is to be regarded in the nature of a bankruptcy law and ineffectual to transfer title to the property of the insolvent in our jurisdiction as against attaching creditors. In considering whether the title of the assignee in Wisconsin is paramount to the claims of creditors here, who, subsequent to the assignment procured attachments against the debt owing to the Wilcox Manufacturing Co. by the Canton Lumber Co., a reference to the Wisconsin statute, under which the assignment was made becomes important. The original Wisconsin statute upon the subject of voluntary assignments by failing debtors was similar to the statute of this state upon the same subject. It was a statute prescribing the conditions of such assignment, and regulating the administration of the trust for the protection of creditors. In 1889 radical changes were made in the statutory system of Wisconsin, and the prior statute was amended. The amendments among other things, provided that the assignor in a voluntary assign-

ment for the benefit of his creditors, made under or in pursuance of the laws of the state 'may be discharged from his debts as a part of the proceeding under such assignment, upon compliance with the provisions of this act.' It further declared that every creditor of an insolvent debtor, residing within or without the state, who should accept a dividend out of the assigned estate, or in any way, by proving his claim or otherwise, participate in the proceedings under the assignment shall be 'deemed to have appeared in the matter of such assignment, and the application for a discharge, and shall be bound by any order of discharge granted by the court' subject to the right of appeal. Under the statute, a creditor, by accepting a dividend, thereby consented to a discharge of the debtor from the portion of the debt remaining over and above his share of the assets; and, unless a creditor comes in under the assignment, he is debarred from receiving anything out of the assigned property, unless indeed, a surplus should remain after payment of the participating creditors in full, although it seems the debt would remain as a claim against the insolvent. The power to discharge a contract without payment or satisfaction, without the consent of the creditors, is a power which pertains to the sovereign alone. The statute of Wisconsin does not assume to discharge the debts owing by the insolvent assignor absolutely. But, as has been said, it deprives creditors who do not come in under the assignment of a share in the assigned estate, unless in the improbable contingency of a surplus. This coercive feature of the scheme, if contained in a voluntary general assignment for the benefit of creditors, would render the assignment void; (Grover v. Wakeman, 1 Wend. 189). Effect cannot be given here to this coercive feature in the Wisconsin law, except by giving extra-territorial effect to the law of that state. The assignor had no power to make such a condition, and, if it is legal, it is by force of the Wisconsin statute alone. This feature is one of the distinguishing tests of an insolvent or bankrupt law. The assignment was voluntary in the sense that the Wilcox Manufacturing Co. were not coerced into

executing it, and the title to the property was vested in the assignee by its own act, but whether it is to be treated as voluntary in another jurisdiction when the claims of creditors there are in question, is the point. The assignment purports to have been made under and in pursuance of the law of Wisconsin. The assignor, by proceeding under that law, presumably designed to avail itself of the provisions for a discharge. This can only be accomplished by force of the law. The right of an insolvent or bankrupt to initiate voluntary proceedings in bankruptcy is a common feature to bankrupt laws, but that fact does not make the assignment voluntary, so as to give extra territorial operation to the proceedings. This point was adverted to in the case of Upton v. Hubbard, 28 Conn. 274, where the court said, 'in our view, there is essentially no difference whether in consequence of an act of bankruptcy as in England, the bankrupt's estate is forced from him, or he, himself, sets the law in motion by a conveyance in bankruptcy in the first instance. Under the Wisconsin statute, the transfer is voluntary, but the law then steps in and regulates the distribution of the assigned estate in accordance with conditions which the sovereign alone can impose. It would, we think, be disregarding the substance to hold that this voluntary feature of the law distinguishes it from the class of bankrupt or insolvent statutes which, by general consent, in this country, are held to be ineffectual to transfer the title of the insolvent to property in another state, as against attaching creditors there."

The Supreme Court of Illinois in a case decided in June, 1894, had occasion to construe the statute of Wisconsin on the subject of insolvent debtors, and arrived at the same conclusion in regard thereto announced by the Court of Appeals of New York. After calling attention to the provisions of the act providing for the discharge of the insolvent debtor, the court said:

"It is manifest that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid under the laws of that state, can only avoid a final discharge of the debtor from all liability on his debt, by declining to participate in any way in the assignment proceedings. He is therefore compelled to consent to a discharge as to so much of his debt as is not paid by dividends in the insolvent proceeding, or take the hopeless chance of recovering out of the assets of the assigned estate remaining, after all claims allowed have been fully paid.' "We think the fact that the insolvent debtor is not coreced into the execution of the deed of assignment is not of controlling importance when the question as to whether it shall be treated as a voluntary assignment arises in another jurisdiction, between the assignee and creditors of the insolvent. If the Hadfield Co. had attempted to write into this deed of assignment, that part of the statute of Wisconsin by which it may obtain a discharge against creditors filing their claims, the assignment would have been clearly void at common law.' "As said in Conklin v. Carson, 11 Ill. 508, 'a debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for the preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his futrue acquisitions.' If this appellant had set up in his interpleader a voluntary deed of assignment containing a condition for the release of the assignor as to creditors who should file their claims, he would have been met with the objection that such an assignment is void in Illinois. Is he in any better position in asking the court to give effect to an assignment made under the statute of another state, which gives the right, and provides all the means by which the debtor may make such release? We think not. In either case, the assignment controvenes the plain and well settled law of this state. As we said in Woodward v. Brooks, 128 Ill. 222, 'but if the foreign assignment, if made here, would be set aside as fraudulent or contrary to the policy of

our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the state where made."

Townsend v. Coxe, 151 Ill. 62 (37 N. E. 639).

In the case of Weider v. Maddox, supra, the court defines voluntary asignments, as that expression is used in the books, to be such as are the products of a will acting without legal compulsion, and distinguishes such assignments from those made solely by operation of law or by an assignor under legal compulsion. The court said:

"The one has such effect as other contracts, while the other has effect solely by force of the law which makes or compels the assignor to make the assignment. This difference it is important to observe when considering the effect to be given an assignment in a state other than that in which it is made. If it be an assignment under a compulsory statute, it stands alone by force of the law, which cannot operate extra-territorially. The law is compulsory if it requires the assignment to be made, even at the request of creditors, or if it provides for the discharge of claims of creditors without their consent, upon a voluntary surrender by the debtor under the terms of the law, of all his property for the benefit of creditors. State insolvent laws, which compel the insolvent debtor to surrender his property to an assignee to be administered under the direction of a court, for the benefit of creditors, and which compel the creditor to release the debtor on such surrender, are instances of these classes." Citing Wharton on Conflict of Laws, 390, Story on Conflict of Laws, 410-416, Burrill on Assignments, 303, Ogden v. Saunders, 12 Wheat. 213, Harrison v. Sterry, 5 Cranch. 302, U. S. v. Bank, 8 Rob. (La.) 414 Hutchinson v. Peshine, 16 N. J. Eq. 167, Felsh v Bugbee, 48 Me. 9, Walters v. Whitlock, 9 Fla. 95, Willitts v. Waite, 25 N. Y. 583, Holmes v. Remsen, 20 Johns. 265, Abraham v. Plestero, 3 Wend. 538, Dalton v.

Currie, 40 N. H. 247; Saunders v. Williams, 5 N. H. 214, Blake v. Williams, 6 Pick. 285.

In McClure v. Campbell, 71 Wis. 350, the co-partnership firm of Gillespie and Harper, citizens of Minnesota, and doing business in that state, made an assignment to the plaintiff McClure for the benefit of their creditors, under the provisions of the Minnesota statute (Chap. 148, Laws of 1881). Subsequent to the assignment, one Johnson ,also a citizen of Minnesota, commenced an action against Gillespie and Harper, in the Circuit Court of St. Croix county, Wisconsin, and attached certain personal property belong at the date of the assignment, to the insolvent debtors, and situated in the state of Wisconsin. The property attached was in the actual custody of the assignee. Judgment was rendered against the defendants, and the attached property was sold under an execution issued on such judgment. The assignee brought suit in the Wisconsin courts against the sheriff for the recovery of the property. The circuit court held that the plaintiffs obtained under the assignment no title to the property in the state of Wisconsin, so seized under the writ of attachment, and gave judgment for the defendants. On appeal to the Supreme Court this judgment was affirmed. Lyon, J., in delivering the opinion of the court, called attention to the decisions of the Supreme Court of Minnesota, construing the act under consideration, and said:

"Thus it will be seen that although an assignment under Chap. 148 of the statutes of Minnesota for 1881, in a certain sense is voluntary, in that the debtor is not compelled to make it, a feature com-

mon to many, perhaps most insolvent laws, including those of this state, yet that court holds it to be in substance and legal effect, an assignment by operation of the statute, thus held to be a bankrupt law, executed as a part of the procedure in the administration of that law. We regard the above adjudication of the Supreme Court of Minnesota, in the construction of their act of 1881, as binding upon this court, and hence shall not examine or discuss the argument of counsel of plaintiff against the accuracy of such construction. We will only say that our consideration of the subject has inclined us to think that the court construed the act correctly."

The Supreme Court of Iowa in the case of Franzen as assignee of the St. Paul German Ins. Co. v. Hutchinson, 62 N. W. 698, came to the same conclusion announced by the Supreme Court of Minnesota and by the Supreme Court of Wisconsin. The court, Deemer, J., said: 'The statute of Minnesota referred to, makes an assignment thereunder practically an assignment in bankruptcy, and as such is contrary to the policy of our laws, and will not be enforced in this state." "We will not give extra teriitorial effect to the assignment under which plaintiff claims the right to sue."

Thus it will be seen that not only has the Supreme Court of the state of Minnesota construed the statute under which this assignment was made, to be a bankrupt act, but we have also the decision of the Supreme Court of Wisconsin, and the Supreme Court of Iowa, giving the same construction to the act in question, and in addition to this, decisions by the Court of Appeals of New York and by the Supreme Court of Illinois, giving the same construction to similar provisions contained in the insolvent law of the state of Wisconsn. To the same effect is Weider v. Maddox, 66 Tex. 373, above quoted.

If, as we think, we have conclusively shown, the Minnesota statute under which the assignment in question was executed, and upon which it must depend for its validity, is in effect a bankrupt act, then the assignment has no force or effect beyond the territorial limits of the state of Minnesota, as against the conflicting rights of non-resident creditors.

It may be, and it doubtless is, true as contended by plaintiffs in error, that the assignment is effectual as between the assignor and assignee, and is valid as to creditors (if any), who assented to its provisions before the attachment, and is sufficient to authorize the assignee, in the absence of objection by non-assenting creditors, to take possession of the property of the assignor wherever located. But as to creditors who have not assented, it is absolutely void by the laws of Massachusetts, as to property there situated, not only as to property which has not been reduced to possession by the assignee, but as to property actually in its hands, beyond the aggregate amount of the claims of creditors who have become parties to the assignment. These propositions are expressly laid down in the case of Bradford v. Tappan, 11 Pick. 76, cited and quoted with approval in the case of Pierce v. O'Brien, 129 Mass. 314.

The American authorities almost unanimously hold that a statutory assignment or an assignment made pursuant to the provisions of a bankrupt act, has no extra territorial effect. In nearly all of them the distinction between a purely

voluntary assignment, such as would be good at common law, and an assignment made pursuant to some express legislative act of a particular state, differing essentially from a common law assignment, is clearly pointed out. A voluntary assignment is held to be in the nature of a contract, and is in substance a transfer of the assignor's property to the assignee, with the condition attached that the assignee shall distribute the same, or the proceeds thereof, among the several creditors of the assignor, either in designated proportions or pro rate among all his creditors. On the other hand, it is held that a statutory assignment is in effect an assignment by operation of the law of the state where made, and can have no effect as a matter of law upon property either real or personal, situated in another state. In some of the states, a foreign assignee under an involuntary or statutory assignment, good by the law of the state where made, is permitted to come into another state and take possession of the personal property of his assignor there situated, and to withdraw it from control of that state and its laws, in the absence of any objection thereto by any of the creditors of the assignor who have not assented to the assignment. But this is done merely as a matter of courtesy or comity, and not, as has been shown, as a matter of abstract right. In such cases the assignee takes the property subject to every equity belonging to attaching creditors, and subject to the remedies provided by the laws of the state of the situs, and when they are permitted to sue in a foreign state, it is not as assignees having

an interest, but as the representative of the bankrupt. They stand upon the footing of administrators only, with a right to sue for the benefit of all the creditors.

Story on Conflict of Laws (8th Ed.), 411.

Mine v. Moreton, 6 Binney (Pa.), 368.

Upton v. Hubbard, 28 Conn. 273.

Paine v. Lester, 44 Conn. 196, and other cases above cited.

In Barth v. Backus, 140 N. Y. 230, the question under consideration was whether an assignment made under the insolvent law of the state of Wisconsin, was valid and effectual to transfer to the assignee the title to personal property situated in the state of New York, as against a subsequent attachment levied by a Wisconsin creditor in the courts of New York. The court holding the Wisconsin statute under which the assignment was made, to be in the nature of a bankruptcy act, held that the assignment was void and ineffectual to transfer to the assignee the title to the personal property of the debtor having its actual situs in that state, as against the rights of the attaching creditor, although the attachment proceedings were instituted subsequent to, and with notice of the assignment. The court, Andrews, Ch. J., said:

"The general rule that the validity of a transfer of personal property is to be governed by the law of the domicile of the owner, is in most jurisdictions held to apply to a transfer by voluntary assignment by a debtor of all his property for the benefit of creditors, as well as to specific transfers by way of ordinary sale or contract, and the title of such as-

signee valid by law of the domicile, will prevail against the lien of an attachment issued and levied in another state or country subsequent to the assignment, in favor of a creditor there, whether a citizen or non-resident, upon a debt or chattel belonging to the assignor embraced in the assignment, provided the recognition of the title under the assignment would not contravene the statutory law of the state, or be repugnant to its public policy. The decisions are not uniform, but this is the general rule, supported by the preponderating weight of authority, and is the settled law of this state."

But this general rule is subject to a qualification established in the jurisprudence of the American states, that a title to personal property acquired in invitum under foreign insolvent or bankrupt laws, good according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, although the proceedings were instituted subsequent to, and with notice of the transfer in insolvency or bankruptcy." "This exception proceeds upon the view, that to give effect to such a transfer arising by operation of law, and not based upon the voluntary exercise by the owner of the jus disponendi, would be to give the foreign law extra-territorial operation, which the rule of comity ought not to permit to the prejudice of suitors in another jurisdiction. The cases in this state, since the case of Holmes v. Remsen, 4 John Ch. 460, in which the Chancellor sought to maintain the English doctrine on the subject, have uniformly sustained the right of domestic attaching creditors against a title under a prior statutory assignment in another state or country, the several states of the Union being treated for this purpose as foreign to each other." Citing Willetts v. Waite, 25 N. Y. 577; Johnson v. Hunt, 23 Wend. 87; Kelly v. Crapo, 45 N. Y. 87.

In McClure v. Campbell, 71 Wis., supra, the court

having determined that the Minnesota statute under which the assignment in that case was made, was in effect a bankrupt act, said:

"The only remaining question, and it is the controlling question in the case, is, has an assignment of property, made pursuant to a bankrupt act, the assignee being in effect an officer of the court, and the assigned property being in custodia legis, and administered by or under the direction of the court, any extra-territorial effect? That is to say, should the courts of this state recognize such an assignment as a valid transfer to the assignee of personal property in this state, and thus defeat an attachment levied upon it, pursuant to the laws of this state by a creditor of the assignor? We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the state in which the insolvency or bankruptcy proceedings were had. The cases on this subject are very numerous. No review of them will be here attempted. While some of them may, under special circumstances, extend the rule of comity to such a case, and thus give extra-territorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can have no legal operation out of the state in which such proceedings were had."

In Johnson v. Hunt, 23 Wend. 87, decided in 1840, Mr. Justice Cowan said: "The current of the decisions, as I understand it, is, that an assignment in invitum under the laws of the one state or nation, has no operation in another, even with respect to its own citizens."

The court, speaking of the case of Ogden v. Sanu-

ders, 12 Wheat. 358, further said: "I have examined that opinion, and as I understand it, all these assignments coerced by foreign laws are placed on the same footing, including even those which result in a discharge of the bankrupt's contracts." "The law which compels the assignment has no extra-territorial force. Its voice cannot be heard, and there is no atmosphere which it can breathe in a foreign soil. It there becomes a dead letter."

In the case of Willetts v. Waite, 25 N. Y. 577, an Ohio corporation, engaged in the business of banking in that state, having become insolvent, receivers were appointed under the provisions of an insolvent act of the state of Ohio. Subsequent to the assignment various creditors instituted suit in the Superior Court of New York, and attached certain funds of the insolvent bank on deposit in the American Exchange Bank of New York. The receivers made a demand upon the American Exchange Bank for the funds in question, and their demand being refused, commenced an action against the bank to recover the same. The plaintiff commenced an action against the receivers and other creditors who had subsequently attached the funds, to compel the receivers to interplead, and to obtain an adjudication of the rights of the respective parties. Judgment having been entered sustaining the title of the attaching creditors, against the receivers, the case was subsequently, upon their appeal, presented to the Court of Appeals for its consideration. The Court, by Sutherland, J., said:

"It may be conceded that, as between the receivers and the insolvent bank, the statute vested in the receivers on their appointment

the title to the funds in question, in the American Exchange Bank; but as the Ohio statute and the proceedings under it, could have no force or operation in this state, except such as might be conceded to it by the authorities and courts in this state, on the principle of comity, it follows that such title must be deemed to have vested in such receivers subject to the control and authority of the courts of this state over the funds under the laws and regulations of this state. The question, then, is one of comity, to be settled by the decisions of the courts of this state, as determining how far they will recognize a foreign involuntary bankruptcy proceeding." The court citing Holmes v. Remsen, 20 John. 259, and Abraham v. Plestero, 3 Wend. 590, and 1 Paige Ch. 236, concluded, "The same principles apply to bankruptcy proceedings under a statute of one of the states of the union." Citing Johnson v. Hunt, 23 Wend. 87, Hoyt v. Thompson, 19 N. Y. 224. Allen, J., concurring, reviewed more at length the decisions of the various state and federal courts, and in the course of his opinion said:

"The title of the claimants, Waite and Young, was a title by an act and operation of law, by the voluntary act and transfer of the owner. The law distinguishes between these two classes in determining the effect to be given to transfers of movable property at the time actually within a jurisdiction foreign to that of the owner." "By a sort of fiction, that which is known as personal property adheres to the person, and has no fixed situs, and hence the maxim 'Mobilia sequunater personam,' and the law which governs the person of the owner will control as to the disposition or transmission of it. But not so as to devolution of title by act and operation of law, whether by forfeiture, bankruptcy, insolvency, or otherwise. In such case, the transfer depending upon positive law, is only operative where such law prevails, and is obligatory; and as the laws of a state or government have no extra territorial force, it follows that title to property in one state does not pass by virtue of a law of a foreign state, although it be the state and domicile of the

owner. The law operates, if at all, in rem, and the state by whose legislation it is enacted having no jurisdiction over property without its territorial limits, it is entirely inoperative in respect to it. A quasi effect may be given to the law as a matter of comity and interstate or national courtesy, when the rights of creditors or bona fide purchasers, or the interests of the state do not interfere, by allowing the foreign statutory or legal transferee to sue for it in the courts of the state in which the property is; but he is regarded in such cases as representing the owner, and to this extent effect is given in one state or country to the laws of another. This has come to be the well established rule of this state, the United States, and most of the states of the union, and although it differs essentially from the rule in Great Britain and other countries of Europe, it is no longer an open question here."

In the case of Upton v. Hubbard, 28 Conn. 275, the court holds that foreign assignees are classed with foreign executors, administrators, and guardians, who, having title, right or power by mere operation of law, have it co-extensive only with the sovereignty or state which gives it, and hence the court says:

"It follows that such title, right and power, have no existence in another sovereignty and are not of course recognized, though they are admitted in certain cases as a matter of courtesy. This doctrine is familiar to every lawyer, in the case of foreign executors and administrators, and we can see no reason why it is not equally true as to foreign assignees. They are mere agents of the law—instruments of the government, to settle the affairs of a deceased or bankrupt debtor. And, in our view, there is essentially no difference, whether, in consequence of an act of bankruptcy, as in England, the bankrupt's estate is forced from him, or he sets the law in motion himself by a conveyance in bankruptcy in the first instance. It is a local gov-

ernmental proceeding.' "The attaching creditors, by pursuing the steps of our law, certainly acquired a lien upon the debt due from Hubbard, which no foreign proceeding under the bankrupt law of Massachusetts can destroy or impair without allowing an extra-territorial effect to the law of that state in conferring title upon the assignees; which we cannot do. The right of the attaching creditors to the lien obtained by their attachments being good here, must remain good, and we see no reason why they may not enforce that lien by prosecuting their suit to judgment and execution, which is the only positive mode of realizing anything from the lien, known to our law."

To the same effect is Milne v. Moreton, 6 Binn. Pa. 353.

In the case of Paine v. Lester, 44 Conn. 196, supra, the court discussing the general principle applied by the English and American authorities, that personal property having no situs is subject to the laws of the owner's domicile, and can be transferred by a voluntary assignment of sale made by him in accordance with the laws of his domicile, says: "While fully admitting this general principle, the American cases, instead of starting from it, in entering upon the discussion, start from another equally well settled principle, that the laws of a state or country have no legal effect beyond the limits of its territory. This being so, they regard the giving effect to the laws of a sister state or foreign country, in the case of the transfer of, or succession to personal property, within their own limits, as wholly an act of comity, and not a recognition of a right. This comity they are prepared to extend where there is no reason to the contrary, especially if there is no interest of their own citizens or of the citizens of a sister state, who are seeking to avail themselves of the protection of their laws, to be inju-

riously affected by such recognition." Citing numerous cases.

In the case of Catlin v. Wilcox S. P. Co., 123 Ind. 477, it appeared that a citizen of Illinois had been adjudged insolvent by the courts of that state, and a receiver appointed in the insolvency proceedings, who was by order of the court vested with the title to all of the property of the insolvent debtor, wherever the same might be situated. Subsequent to the appointment of the receiver, the Wilcox Silver Plate Company, a citizen of the state of Connecticut, brought an action against the insolvent debtor in the courts of Indiana, and garnished an indebtedness owing to the insolvent by a citizen of that state. The Illinois receiver, claiming title to the funds in the hands of the garnishee ,intervened by elave of the court. The Supreme Court in disposing of the case, said:

"The controversy, as will appear, involves the right to the funds in the hands of the garnishee-defendant, and the question presented is, are the rights of the non-resident attaching creditors paramount in the courts of this state to those of the receivers of the Superior Court of Cook county, whose appointment antedates the issuing of the writ of attachment? The solution of the question depends upon the extent of the power which the courts of general jurisdiction in one state, can exercise over property whose actual situs is within the jurisdiction of the courts of a foreign state. A receiver is nothing more than an officer or creature of the court that appoints him. His acts are those of the court whose jurisdiction may be aided but in no wise enlarged or extended, by his appointment. His power is only co-extensive with that of the court which gives him his official character. While it has

been held that a court may appoint a receiver and authorize him to take possession of property in a foreign jurisdiction, the doctrine is universal that the appointment confers no legal authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it is found. The appointment, of its own force, gives him the right to take possession of the property, but it confers upon him no power to compel the recognition of that right out side the jurisdiction of the court making the appointment. While there are authorities of great weight, which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign state, the generally prevailing doctrine upon which all the decisions seem to be harmonious, is, that upon the principles of comity the courts or jurisdiction in which the property or fund is situated, will recognize the rights of the receiver, so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy or interfere with the rights of resident creditors. "But the recognition of well established principles of comity and courtesy between courts of different jurisdictions is one thing, while the the rights of resident or other attaching creditors who are seeking to avail themselves of legal proceedings, authorized by the statute of the state, for the appropriation of the fund belonging to a non-resident debtor, must be determined upon altogether different principles. As has in effect been said, courts are prepared to extend comity where there is no reason to the contrary; especially if there is no interest of their own citizens or of the citizens of another state, who are asking the protection of their laws, injuriously affected by such recognition." Citing Paine v. Lester, 44 Conn. 196; Milne v. Moreton, 6 Binn. 361. "While it is true, as has been remarked before, the domicile of the owner under legal contemplation, draws to it his personal estate, wherever it may be, yet as this is so only by fiction of law, the rule is not of universal application. When, by the law and policy of the state where the property is actually located, it is subject to the process of attachment

or garnishment at the suit of a domestic or other creditor, the fiction yields and the actual situs of the property determines whether or not it should be subjected to the process of the court:" Citing Warner v. Jaffray, 96 N. Y. 248; Green v. Van Buskirk, 7 Wallace 150; Guillander v. Howell, 35 N. Y. 657; Faulkner v. Hyman, 143 Mass. 53; Moore v. Church, 70 Ia. 208; Weider v. Maddox, 66 Tex. 372; Rhaum v. Pearce, 110 Ill. 350; Walters v. Whitlock, 9 Fla. 86.

The decision of the Massachusetts courts are in entire harmony with the rule which is clearly and unequivocally announced in these cases.

In Taylor v. Columbia Ins. Co., 14 Allen 353, the plaintiff, a citizen of Massachusetts, brought an action against a New York corporation for the recovery of a debt, and attached a fund due to the corporation by another Massachusetts citizen upon certain promissory notes. It appeared by the disclosure of the trustees that the defendant corporation had been adjudged insolvent and receivers appointed by the courts of New York, and further that an action had been brought by these receivers upon the notes in question in the courts of that state. The receivers also intervened in the attachment proceedings in Massachusetts, claiming the fund in the hands of the trustees. The court said: "The real question therefore, is whether the assignment of the property of the corporation to receivers under judicial proceedings in New York, can prevail against this attachment. This question is conclusively settled by authority. The effect of foreign laws beyond their own jurisdiction depends solely upon the comity of the state in which their application is invoked. The general rule is everywhere admitted

that the transfer of personal property, wherever situated, is to be governed by the law of domicile of the owner. But the exception is equally well established in this country that when, upon the insolvency of a debtor, the law of the state in which he resides, assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by courts of another state to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." "It can make no difference whether the persons to whom the involuntary assignment is made, are called assignees, trustees or receivers, or whether the debtor is an individual or corporation, provided either remains in existence and liable to be sued. An assignment under the laws of another state of the Union stands upon the same ground as one made under the laws of a foreign country, for the states are in this respect independent of one another; and subject to no common control, so long as there is no national bankruptcy law. An assignment like that on which these claimants rely, would, if made in another state, be allowed no effect in the courts of New York against proceedings under the laws of that state by its own citizens. The decisions of that state are collected in Willetts v. Waite, 25 N. Y. 577, which cannot be distinguished from this case, and in which an assignment to receivers under the statute of Ohio of all the property of a corporation, established in Ohio, was held to give the receivers no title to funds due to the corporation from a bank in New York as against subsequent attachments in New York by citizens of that state. Trustees must be charged."

In the case of Frank v. Bobbitt, 155 Mass. 112 (29 N. E. Rep. 209) the plaintiff, a citizen of Maryland, brought an action in Massachusetts, and there attached personal property of the debtor, who was a citizen of North Carolina, and who had there made

a voluntary assignment for the benefit of his creditors prior to the commencement of the attachment suit. The court held that the assignment being good at common law, and by the laws of the state of North Carolina, where made, and in no way prejudicial to the interests of the citizens of Massachusetts, no reason was shown why the title of the assignee thereunder should not be recognized in preference to the rights of the attaching creditors citizens of Maryland. The Court said:

"The plaintiff insists that the assignment should be declared void on account of the preference which it creates and because it does not appear to have been assented to by creditors of the assignor, and is without consideration; and they claim the same right to avoid it on these grounds that an attaching creditor, who was a citizen of this state would have. It is to be observed that the assignment is a voluntary one, and not a statutory one, as in Paine v. Lestef, 44 Conn. 196, which was disposed of on the ground that a statutory assignment could have no strictly legal effect outside the state where it arose. As sustaining that proposition, see Blake v. Williams, 6 Pick. 286; May v. Wannamacher, 111 Mass. 202; Willetts v. Waite, 25 N. Y. 587, and cases cited; Kelly v. Crapo, 45 N. Y. 86; Harrison v. Sterry, 5 Cranch 298; Ogden v. Saunders, 12 Wheat. 213; Story Conflict of Laws (7th Ed.) Section 414."

To the same effect is Pierce v. O'Brien, 129 Mass. 314.

In Cunningham v. Butler, 142 Mass. 47, the plaintiffs as assignee in insolvency of one Bird, a citizen of Massachusetts, brought an action in the courts of that state against the defendants Butler and others to restrain them from prosecuting a suit by attach-

ment against the property of the insolvent debtor in the courts of New York. It was practically conceded that within the rule laid down in Dehon v. Foster, 4 Allen 545, the court had jurisdiction in equity upon a proper case made to enjoin the defendants from prosecuting their attachment proceedings in the state of New York. The court said:

"If it had held that the facts in the case at bar are as we apply them to be, the argument of the defendants is principally directed to show that the case of Dehon v. Foster was erroneously decided; and that it should now be reconsidered and overruled. They contend that the provisions of the Constitution of the United States, Art. 4, Sec. 1, which enacts that 'full faith and credit shall be given in each state to the public acts, records, and pudicial proceedings of every other state' was not therein sufficiently considered, and that, as th eattachment proceedings in New York, in the case at bar, are judicial proceedings by a court of competent jurisdiction, the plaintiffs are not entitled to relief, as the courts in that state are entitled to determine to whom the property therein found belongs. They especially rely upon the case of Green v. Van Buskirk, 5 Wallace 307 and 7 Wallace 139; Warner v. Jaffray, 96 N. Y. 248, and Lawrence v. Batcheller, 131 Mass. 504, all of which have been decided since Dehon v. Foster." "But the case of Dehon v. Foster recognizes the law to be as held by the Supreme Court of the United States in Green v. Van Buskirk; 'The case' says Ch. J. Bigelow, 'proceeds on the ground that the defendants, if allowed to proceed with their action, will perfect the lien which is now inchoate under their attachment, and will thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania."

"The case of Lawrence v. Batcheller clearly recognizes the ground above stated as that upon which Dehon v. Foster proceeds, and in no way controverts it. That was a case in which the attaching creditor, who was a resident of this state, had pro-

ceeded to judgment in a foreign state, after proceedings in insolvency here, and had actually collected the amount, by virtue of his attachment, from the funds in the hands of a trustee of the debtor. He was sued in this state for the amount he had thus collected by the assignee in insolvency. It was said, referring to the case of Dehon v. Foster, 'because it was beyond the power of the court to call in question the validity of this lien acquired under the laws of another state, it proceeded to enjoin the defendants over whom the court had jurisdiction, from enforcing in another state their legal rights."

It is clear from what is said in Frank v. Bobbitt, supra, and from an examination of the decisions in the case of Dehon v. Foster, Lawrence v. Batcheller and Cunningham v. Butler, above cited, that the courts of Massachusetts recognize the law to be that an assignment made under the insolvent law of that state, has no effect upon property situate within the limits of another state, and it was for this reason that they proceed to enjoin citizens of that state from proceeding to judgment in an attachment suit brought in a foreign jurisdiction, the effect of which would be to divert property of the debtor which otherwise would come to the possession of the assignee, for the equal benefit of all the creditors of the insolvent, to the payment of debts of the attaching creditors.

The only case cited by counsel for the plaintiff in error which is in point and apparently in conflict with the decisions above cited, is the case of Schuler v. Israel, 27 Fed. Rep. 851, decided by Mr. Justice Brewer in 1886. An inspection of the record in that case shows that the validity of the assignment,

which was made under the Texas statute regulating assignments by insolvent debtors, was drawn in question only in a casual way. The opinion was delivered orally and is merely to the effect that the assignment being "valid in Texas, where it was executed, it must be considered valid here save as it conflicts with the rights of resident creditors."

Citing Burril, Assignm. (3rd Ed.) Sec. 310, and cases cited.

The distinction between a purely statutory assignment depending for its validity upon the statute of a sister state and a general voluntary assignment for the benefit of creditors, good at common law, does not seem to have been called to the attention of the learned judge who decided the case. The assignment was attacked upon the ground that it was not valid under the laws of Texas, and further, that it did not comply with the statute law of Missouri relating to assignments for the benefit of creditors. The point was not made or considered that the assignment was void at common law, and, depending for its validity upon the insolvency statute of the state of Texas ,it had no effect or validity, as against the rights of attaching creditors, upon personal property of the insolvent having its actual situs in another state.

The learned judge cites in support of his conclusion that the assignment was valid, Section 110, Burrill on Assignments. We think it will be found that the cases cited by Burrill under that section do not sustain the proposition that an assignment made in Minnesota under an insolvent act, and

which upon its face is for the benefit only of such of the creditors of the insolvent as shall consent to discharge the debtor from all liability, without full payment of their claims, is valid and effectual as a matter of law, to pass to the assignee the title to personal property of the insolvent, having its actual situs in the state of Massachusetts. The same author (Sec. 303) says:

"In considering the qualifications of and exceptions to this general rule of law, it may be primarily observed that there is a clear and well defined distinction, supported by the weight of American authority, between involuntary transfers of property such as work by operation of law under foreign bankrupt assignments and insolvent laws, and a voluntary conveyance. An assignment by law has no legal operation out of the state in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprietor to dispose of his effects for honest purposes." Citing Walters v. Whitlock, 9 Fla. 86; Osborne v. Adams, 18 Pick. 247; Kelly v. Crapo, 45 N. Y. 86, and other cases.

The case of Schuler v. Israel, supra, was appealed to this court and was here affirmed on other grounds. 120 U. S. 506. The validity of the assignment was not considered or passed upon.

The case of Barnett v. Kinney, 147 U. S. 480, is not in point. In that case it is distinctly held that the assignment which was made in Utah was valid as a general voluntary assignment, good at common law, and hence effectual to pass to the assignee the title of the assignor to personal property having its situs in the state of Idaho.

We have not thought it necessary to discuss the question of the effect of the notice had by the defendants in error of the assignment in question prior to the attachment proceedings had in the state of

Massachusetts, for we have not found in any of the numerous cases which we have examined, that the question of notice, or want of notice, on the part of the attaching creditor, is a matter of any importance in determining the conflicting rights of an attaching creditor and an assignee in insolvency, although the courts, in sustaining the rights of an attaching creditor as against an assignee, often comment, in passing, upon the fact that the attaching creditor had no notice of the prior assignment.

In the leading case of Paine v. Lester, 44 Conn. 196, it is said:

"It is of no consequence that the attachment was not made until after the assignment in insolvency and after notice of the assignment had been given to Lester, for the right of the plaintiff is not the right of a prior attaching creditor, but the right of a creditor asserting his claim against the opposing claim of the assignee in insolvency, the one resting on legal proceedings authorized by our laws, and the other only on a comity which we can exercise or refuse to exercise at our discretion. Under these circumstances the court owes a legal duty to the plaintiff, which is far more imperative than the demands of mere hospitality to a stranger. In this case the plaintiff is a citizen of Rhode Island, but that fact does not effect the case."

This we think is the settled law upon this subject.

It is respectfully submitted that under the circumstances of this case both of the questions asked by the learned Court of Appeals should be answered in the negative.

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APPENDIX.

Gen. Laws of Minnesota 1881, Chap. 148, as amended by Gen. Laws 1885, Chap. 73 and Gen. Laws 1889, Chap. 30:

Section 1:

"Whenever any debtor shall have become insolvent or garnishment shall have been made against any debtor,or property of any debtor shall have been levied upon by virtue of an attachment, execution or legal process issued against him for collection of money, he may make an assignment of all his unexempt property, for the equal benefit of all his bona fide creditors, who shall file releases of their demands against such debtor, as herein provided; such an assignment shall be made, acknowledged and filed, in accordance with and be governed by the laws of this state relating to assignments by debtors for the benefit of creditors, except as herein otherwise provided; and such assignment, if made within ten days after garnishment shall have been made against the assignor, or within ten days after the property of such assignor shall have been levied upon by virtue of an attachment, execution or other legal process against him for collection of money, as aforesaid, shall operate to vacate every garnishment and levy then pending, and to discharge all property therefrom, upon qualification of the assignee, or his successor, as provided by law, unless he shall, within five days thereafter, file in the office of the clerk of the court, where such assignment was filed, notice of his intention to retain all pending garnishments and levies; in which case the same shall inure to the benefit of the creditors under such assignment, and may be prosecuted by such assignee and his successors; provided, however, that such assignment shall not vacate or effect any levy made by virtue of an execution issued on a money judgment entered against such debtor on a complaint which was on file during at least twenty days next prior to entry of such judgment in the

court in the county where the defendant resided meanwhile."

Section 2:

"Whenever any insolvent debtor shall confess judgment, or do anything whereby any of his creditors shall obtain preference over any other of his creditors or shall omit to do anything which he might lawfully do to prevent any of his creditors from obtaining preference over any other of his creditors, or shall not make an assignment under the first section of this act, within ten days after garnishment made against him or within ten days after levy made on any of his property by virtue of an attachment, execution or other legal process against him for collection of money, or shall conceal, remove, or dispose of any of his unexempt property with intent thereby to delay or defraud his creditors, then, or within sixty days thereafter, any one or more of his creditors having claims against him to the aggregate amount of at least two hundred dollars, may petition the district court, or judge thereof, setting forth facts constituting one or more of said cases,and asking that a receiver be appointed of all the unexempt property of such debtor, and for such other and further relief as may be proper; and said petition may be heard in any county designated by the judge; and upon notice of the time and place of such hearing given as the court or judge shall direct, to the debtor any creditor about to be preferred, the court in term time, or the judge thereof in vacation, shall proceed to hear and determine such petition summarily, and shall receive such evidence as may be pertinent, and if it shall appear to the court, or judge, that such insolvent debtor has confessed judgment, or has done anything whereby any of his creditors have obtained preference over any other of his creditors, or has omitted to do anything which he might have lawfully done to prevent any of his creditors obtaining preference over any other of his creditors, or that he has not made an assignment under the first section of this act, within ten days after garnishment made against him, or within ten days after levy made on any of his prop-

erty by virtue of an attachment, execution or other legal process against him for collection of money, or that he has concealed, removed or disposed of any of his unexempt property with intent thereby to delay or defraud his creditors, then the court or judge shall appoint a receiver, who shall have power and authority to, and who shall take possession of all the property of such debtor, not exempt by law, including all property concealed, removed or otherwise disposed of by such debtor in violation of any provision of this act, and also all property then under garnishment, attachment or levy, except such as was levied upon under an execution issued upon a judgment against such debtor entered on a complaint which was on file in the court in the county where the debtor then resided during the period of at least twenty days next before entry of such judgment; and such receiver shall have power and authority to, and he shall, within four months from his appointment, unless the court or judge shall otherwise direct and shall allow further time, convert said property into money and distribute the net proceeds thereof ratably and in proportion to the amount of their several demands among the creditors of such debtor who shall come in and make due proof of their respective demands within such time and in such manner as the court or judge shall direct, and who shall, in consideration of the benefit of the provisions of this act, execute and file releases of their respective demands against such debtor as herein provided; and the court or judge shall order the debtor to make, verify and file in the court a schedule of all his debts, showing to whom due, when payable, and the consideration of each, and a schedule of all his property. The court in term time, and the judge thereof during vacation, may also make such further and other orders as may be necessary or proper to carry into full effect the provisions of this act, and such orders and applications therefor may be made, served and enforced on Sunday when necessary to protect the rights of creditors or others hereunder."

Section 3:

"No assignment hereafter made for the benefit of such creditors shall give to any one creditor any preference over the claims of another creditor, except in cases expressly provided by law. If any insolvent debtor shall confess or suffer judgment to be procured in any court with intent that any of his creditors shall obtain a preference over any other of his creditors, such insolvent debtor shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding five hundred dollars, and in default of payment shall be imprisoned in the county jail for a period not exceeding six months. The court may at any time, upon the filing of affidavits or other evidence satisfactory to the court, grant an order restraining such debtor from collecting any bills, notes, accounts, or other property, or from disposing of, or in any manner interfering with, the property of said estate, or may, by writ of *ne exeat* or by order, restrain said debtor from leaving the state until the further order of the court, or may require him at any time to appear and make full disclosure as to any disposition of property, or in relation to any other matter pertaining to said estate."

Section 10:

"No creditor of any insolvent debtor shall receive any benefit under the provisions of this act, or any payment of any share of the proceeds of the debtor's estate, unless he shall have first filed with the clerk of the District Court, in consideration of the benefits of the provisions of this act, a release to the debtor of all claims other than such as may be paid under the provisions of this act, for the benefit of such debtor; and thereupon the court or judge may direct that judgment be entered discharging such debtor from all claims or debts held by creditors who shall have filed such releases."

Section 11:

"Such assignee or receiver shall, within ten days after his appointment publish a notice in a daily newspaper published at the capital of this state, and also a daily or weekly newspaper in the county where the debtor, debtors, or any of them, reside, if any is there published, and by sending notices through the mail to such creditors whose residences are known to the assignee or receiver of his appointment, and all creditors claiming to obtain the benefits of this act shall file with such assignee or receiver their claims, within twenty days after such publication."

SECURITY TRUST COMPANY *v.* DODD, MEAD & CO.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 188. Argued and submitted January 23, 1899. — Decided April 11, 1899.

With regard to the operation of a voluntary or common law assignment of his property by an insolvent debtor for the benefit of his creditors upon property situated in other States, there is a general consensus of opinion that it will be respected, except so far as it comes in conflict with the rights of local creditors, or with the laws or public policy of the State in which it is sought to be enforced.

Statement of the Case.

With respect to statutory assignments of the property of an insolvent debtor, the prevailing American doctrine is, that a conveyance under a state insolvent law operates only upon property within the territory of that State, and with respect to property in another State it is given only such effect as the laws of that State permit, and in general must give way to claims of creditors pursuing their remedies there.

The execution and delivery by Merrill & Company to the Security and Trust Company in Minnesota of an assignment of their property for the benefit of their creditors, made under the insolvent laws of that State, and the acceptance thereof by the assignee and its qualification thereunder, and the notice thereof to Mudge & Sons in Massachusetts, who held personal property belonging to the said assignors, did not vest in the assignee such a title to that property that it could not, after such notice, be lawfully seized by attachment in an action instituted in Massachusetts by creditors of the insolvents who were citizens of New York, and who had notice of the assignment, but had not proved their claims against the assigned estate, nor filed a release thereof.

This was an action originally instituted in the district court for the second judicial district of Minnesota, by the Security Trust Company, as assignee of the D. D. Merrill Company, a corporation organized under the laws of Minnesota, against the firm of Dodd, Mead & Company, a partnership resident in New York, to recover the value of certain stereotyped and electrotyped plates for printing books, upon the ground that the defendants had unlawfully converted the same to their own use. The suit was duly removed from the state court to the Circuit Court of the United States for the District of Minnesota, and was there tried. Upon such trial the following facts appeared:

The D. D. Merrill Company having become insolvent and unable to pay its debts in the usual course of business, on September 23, 1893, executed to the Security Trust Company, the plaintiff in error, an assignment under and pursuant to the provisions of chapter 148 of the laws of 1881 of the State of Minnesota, which assignment was properly filed in the office of the clerk of the district court. The Trust Company accepted the same, qualified as assignee, took possession of such of the property as was found in Minnesota, and disposed of the same for the benefit of creditors, the firm of Dodd, Mead & Company having full knowledge of the execution and filing of such assignment.

Statement of the Case.

At the date of this assignment, the D. D. Merrill Company was indebted to Dodd, Mead & Company of New York in the sum of $1249.98, and also to Alfred Mudge & Sons, a Boston copartnership, in the sum of $126.80, which they duly assigned and transferred to Dodd, Mead & Company, making the total indebtedness to them $1376.78.

Prior to the assignment, the D. D. Merrill Company was the owner of the personal property for the value of which this suit was brought. This property was in the custody and possession of Alfred Mudge & Sons at Boston, Massachusetts, until the same was attached by the sheriff of Suffolk County, as hereinafter stated.

The firm of Alfred Mudge & Sons was, prior to March 8, 1894, informed of the assignment by the Merrill Company, and at about the date of such assignment a notice was served upon them by George E. Merrill to the effect that he, Merrill, took possession of the property in their custody for and in behalf of the Security Trust Company, assignee aforesaid.

On March 8, 1894, Dodd, Mead & Company commenced an action against the D. D. Merrill Company in the superior court of the county of Suffolk, upon their indebtedness, caused a writ of attachment to be issued, and the property in possession of Mudge & Sons seized upon such writ. A summons was served by publication in the manner prescribed by the Massachusetts statutes, although there was no personal service upon the Merrill Company. The Security Trust Company, its assignee, was informed of the bringing and pendency of this suit and the seizure of the property, prior to the entering of a judgment in said action, which judgment was duly rendered August 6, 1894, execution issued, and on September 27, 1894, the attached property was sold at public auction to Dodd, Mead & Company, the execution creditors, for the sum of $1000.

Upon this state of facts, the Circuit Court of Appeals certified to this court the following questions:

"First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by

the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the State of Massachusetts, and in the custody and possession of said Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

Mr. Edmund S. Durment, for the Security Trust Company, submitted on his brief.

Mr. James E. Markham for Dodd, Mead & Co. *Mr. Albert R. Moore* and *Mr. George W. Markham* were on his brief.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

This case raises the question whether an assignee of an insolvent Minnesota corporation can maintain an action in the courts of Minnesota for the conversion of property formerly belonging to the insolvent corporation, which certain New York creditors had attached in Massachusetts, and sold upon execution against such corporation. The question was also raised upon the argument how far an assignment, executed in Minnesota, pursuant to the general assignment law of that State, by a corporation there resident, is available

to pass personal property situated in Massachusetts as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.

The assignment was executed under a statute of Minnesota, the material provisions of which are hereinafter set forth. The instrument makes it the duty of the assignee "to pay and discharge, in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter 148 of the General Laws of the State of Minnesota for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such case made and provided; and if, after the payment of all the costs, charges and expenses attending the execution of said trust, and the payment and discharge in full of all the said debts of the party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then, Third, repay such surplus to the party of the first part, its successors and assigns."

The operation of voluntary or common law assignments upon property situated in other States has been the subject of frequent discussion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the State in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. *Black* v. *Zacharie*, 3 How. 483; *Livermore* v. *Jenckes*, 21 How. 126; *Green* v. *Van Buskirk*, 5 Wall. 307; *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664;

Cole v. *Cunningham*, 133 U. S. 107; *Barnett* v. *Kinney*, 147 U. S. 476.

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that State, and that with respect to property in other States it is given only such effect as the laws of such State permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another State. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the State where the property is actually situated. *Harrison* v. *Sterry*, 5 Cranch, 289, 302; *Ogden* v. *Saunders*, 12 Wheat. 213; *Booth* v. *Clark*, 17 How. 322; *Blake* v. *Williams*, 6 Pick. 286; *Osborn* v. *Adams*, 18 Pick. 245; *Zipcey* v. *Thompson*, 1 Gray, 243; *Abraham* v. *Plestoro*, 3 Wend. 538, overruling *Holmes* v. *Remsen*, 4 Johns. Ch. 460; *Johnson* v. *Hunt*, 23 Wend. 87; *Hoyt* v. *Thompson*, 5 N. Y. 320; *Willitts* v. *Waite*, 25 N. Y. 577; *Kelly* v. *Crapo*, 45 N. Y. 86; *Barth* v. *Backus*, 140 N. Y. 230; *Weider* v. *Maddox*, 66 Tex. 372; *Rhawn* v. *Pearce*, 110 Illinois, 350; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477. As was said by Mr. Justice McLean in *Oakey* v. *Bennett*, 11 How. 33, 44, "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." Similar language is used by Mr. Justice Story in his Conflict of Laws, § 414.

The statute of Minnesota, under which this assignment was made, provides in its first section that any insolvent debtor

"may make an assignment of all his unexempt property for the equal benefit of all his *bona fide* creditors, who shall file releases of their demands against such debtor, as herein provided." That such assignments shall be acknowledged and filed, and if made within ten days after the assignor's property has been garnished or levied upon, shall operate to vacate such garnishment or levy at the option of the assignee, with certain exceptions. The second section provides for putting an insolvent debtor into involuntary bankruptcy on petition of his creditors, upon his committing certain acts of insolvency, and for the appointment by the court of a receiver with power to take possession of all his property, not exempt, and distribute it among his creditors. Under either section only those creditors receive a benefit from the act who file releases to the debtor of all their demands against him. This statute was held not to conflict with the Federal Constitution in *Denny* v. *Bennett*, 128 U. S. 489.

The construction given to this act by the Supreme Court of Minnesota has not been altogether uniform. In *Wendell* v. *Lebon*, 30 Minnesota, 234, the act was held to be constitutional. It was said that "the act in its essential features is a bankrupt law;" but it was intimated that it included all the debtor's property wherever situated; "and while other jurisdictions might, on grounds of policy, give preference to domestic attaching creditors over foreign assignees or receivers in bankruptcy, yet, subject to this exception, they would, on principles of comity, recognize the rights of such assignees or receivers to the possession of the property of the insolvent debtor."

In *In re Mann*, 32 Minnesota, 60, the act was, in effect, again pronounced "a bankrupt law, providing for voluntary bankruptcy by the debtor's assignment;" and in this respect differing from a previous assignment law. See also *Simon* v. *Mann*, 33 Minnesota, 412, 414.

In *Jenks* v. *Ludden*, 34 Minnesota, 482, it was held that the courts of that State had no right to enjoin the defendant, who was a citizen of Minnesota, from enforcing an attachment lien on certain real property in Wisconsin owned by the insolvent debtors, although the execution of the assignment might, under

the Minnesota statute, have dissolved such an attachment in that State; and that, even if they had the power to do so, they ought not to exercise their discretion in that case, where the only effect might be to enable non-resident creditors to step in and appropriate the attached property. The court repeated the doctrine of the former case, that the act was a bankrupt act; the assignee being in effect an officer of the court, and the assigned property being in *custodia legis*, and administered by the court or under its direction. The court added: "We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another State, is to be determined exclusively by the laws of Wisconsin." To the same effect see *Daniels* v. *Palmer*, 35 Minnesota, 347; *Warner* v. *Jaffray*, 96 N. Y. 248.

Upon the other hand, in *Covey* v. *Cutler*, 55 Minnesota, 18, an insolvent debtor who had made an assignment under this statute, had a certain amount of salt in Wisconsin, which the defendants had attached in a Wisconsin court. The salt was sold upon the judgment, bid in by them, and the assignee in Minnesota brought an action to recover the value of the salt. Defendants answered, claiming that the assignee never took possession of the salt, and that the Minnesota assignment was ineffectual to transfer the title to property in Wisconsin as against attaching creditors there. Plaintiff was held entitled to judgment upon the ground that a voluntary conveyance of personal property, valid by the law of the place, passed title wherever the property may be situated, and that such transfers, upon principles of comity, would be recognized as effectual in other States when not opposed to public policy or repugnant to their laws. It is difficult to reconcile this with the previous cases, or with that of *Green* v. *Van Buskirk*, 7 Wall. 139. The assignment was apparently treated as a voluntary or common law assignment. This ruling was repeated in *Hawkins* v. *Ireland*, 64 Minnesota, 339, in which an assignment under this statute was said not to be involuntary but voluntary, and that a court of equity had the power to, and would, restrain one of its own citizens, of whom it had jurisdic-

tion, from prosecuting an action in a foreign State or jurisdiction, whenever the facts of the case made it necessary to do so, to enable the court to do justice and prevent one of its citizens from taking an inequitable advantage of another. This accords with *Dehon* v. *Foster*, 4 Allen, 545, and *Cunningham* v. *Butler*, 142 Mass. 47; *S. C.*, *sub nom. Cole* v. *Cunningham*, 133 U. S. 107.

The earlier opinions of the Supreme Court of Minnesota to the effect that the statute in question was a bankrupt act, were followed by the Supreme Court of Wisconsin in *McClure* v. *Campbell*, 71 Wisconsin, 350, in which it was held that the assignment could have no legal operation out of the State in which the proceedings were had, and that the decision of the Supreme Court of Minnesota that the act of 1881 was a bankrupt act was binding. The contest was between the assignee of the insolvent debtor and a creditor who had attached the property of the insolvent in Wisconsin. The court held that the plaintiff, the assignee, took no title to such property, and was not entitled to its proceeds. In delivering the opinion the court said: "We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the State in which the insolvency or bankruptcy proceedings were had. . . . While some of them" (the cases) "may, under especial circumstances, extend the rule of comity to such a case, and thus give an extraterritorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can have no legal operation out of the State in which such proceedings were had."

In *Franzen* v. *Hutchinson*, 94 Iowa, 95; 62 N. W. Rep. 698, the Supreme Court of Iowa had this statute of Minnesota under consideration, and held that as the creditors received no benefit under the assignment, unless they first filed a release of all claims other than such as might be paid under the

assignment, it would not be enforced in Iowa. It was said that the assignment, which was that of an insurance company, was invalid, and that in an action by the assignee for premiums collected by the defendants, who were agents of the company, the latter could offset claims for unearned premiums held by policy holders at the time of the assignment and by them assigned to defendants after the assignment to plaintiffs.

Notwithstanding the two later cases in Minnesota above cited, we are satisfied that the Supreme Court of that State did not intend to overrule the prior decisions to the effect that the act was substantially a bankrupt or insolvent law. It is true that in these cases a broader effect was given to this act with respect to property in other States than is ordinarily given to statutory assignments, though voluntary in form. But the court was speaking of its power over its own citizens, who had sought to obtain an advantage over the general creditors of the insolvent by seizing his property in another State. There was no intimation that the prior cases were intended to be overruled, nor did the decisions of the later cases require that they should be.

So far as the courts of other States have passed upon the question, they have generally held that any state law upon the subject of assignments, which limits the distribution of the debtor's property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another State, when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to and with notice of the assignment in insolvency. The provision of the statute in question requiring a release from the creditors in order to participate in the distribution of the estate, operates as a discharge of the insolvent from his debts to such creditors — a discharge as complete as is possible under a bankrupt law. An assignment containing a provision of this kind would have been in many, perhaps in most, of the States void at common law. *Grover* v. *Wakeman*, 11 Wend. 187; *Ingraham*

v. *Wheeler*, 6 Conn. 277; *Atkinson* v. *Jordan*, 5 Hammond, 293; Burrill on Assignments, 232 to 256. As was said in *Conkling* v. *Carson*, 11 Ill. 503: "A debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for a preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his future acquisitions." In *Brashear* v. *West*, 7 Pet. 608, an assignment containing a provision of this kind was upheld with apparent reluctance solely upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid. If the assignment contain this feature, the fact that it is executed voluntarily and not *in invitum* is not a controlling circumstance. In some States a foreign assignee under a statutory assignment, good by the law of the State where made, may be permitted to come into such State and take possession of the property of the assignor there found, and withdraw it from the jurisdiction of that State in the absence of any objection thereto by the local creditors of the assignor; but in such case the assignee takes the property subject to the equity of attaching creditors, and to the remedies provided by the law of the State where such property is found.

A somewhat similar statute of Wisconsin was held to be an insolvent law in *Barth* v. *Backus*, 140 N. Y. 230, and an assignment under such statute treated as ineffectual to transfer the title of the insolvent to property in New York, as against an attaching creditor there, though such creditor was a resident of Wisconsin. A like construction was given to the same statute of Wisconsin in *Townsend* v. *Coxe*, 151 Illinois, 62. It was said of this statute, (and the same may be said of the statute under consideration,) "it is manifest from these provisions that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid under the laws of that State, can only avoid a final discharge of the debtor from all liability on his debt, by declining to participate in any way in the assignment proceedings. He is, therefore, compelled to consent to a discharge as to so much of his debt

as is not paid by dividends in the insolvent proceedings or take the hopeless chance of recovering out of the assets of the assigned estate remaining after all claims allowed have been paid." To the same effect are *Upton* v. *Hubbard*, 28 Conn. 274; *Paine* v. *Lester*, 44 Conn. 196; *Weider* v. *Maddox*, 66 Texas, 372; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477; *Boese* v. *King*, 78 N. Y. 471.

In *Taylor* v. *Columbia Insurance Co.*, 14 Allen, 353, it is broadly stated that "when, upon the insolvency of a debtor, the law of the State in which he resides assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts of another State to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." But the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority. *Upton* v. *Hubbard*, 28 Conn. 274.

While it may be true that the assignment in question is good as between the assignor and the assignee, and as to assenting creditors, to pass title to property both within and without the State, and, in the absence of objections by non-assenting creditors, may authorize the assignee to take possession of the assignor's property wherever found, it cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other States. *Bradford* v. *Tappan*, 11 Pick. 76; *Willitts* v. *Waite*, 25 N. Y. 577; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477, and cases above cited.

We are therefore of opinion that the statute of Minnesota was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that State chose to respect it, and that so far as the plaintiff,

as assignee of the D. D. Merrill Company, took title to such property, he took it subservient to the defendants' attachment. It results that the property of the D. D. Merrill Company found in Massachusetts was liable to attachment there by these defendants, and that the courts of Minnesota are bound to respect the title so acquired by them.

The second question must therefore be answered in the negative, and as this disposes of the case, no answer to the first question is necessary.